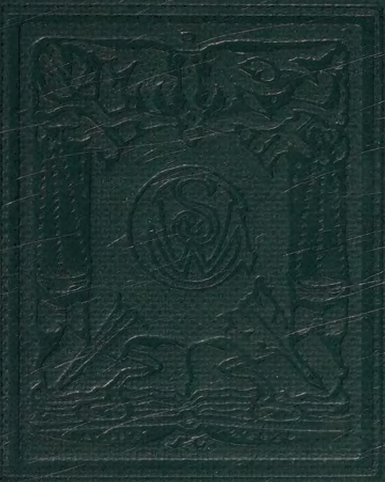

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MILITARY LAW.
MILITARY MANŒUVRES ACTS.
MILITIA.

See ARMED FORCES OF THE CROWN.

MILK AND DAIRIES.

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MINES AND MINERALS.

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SECTION 1.—INTRODUCTORY.

1. It has been well observed that "the rules regarding the enjoyment of all substances lying beneath the soil are very similar to those which apply to the use of the soil itself and of that which it supports. Examples taken from recorded disputes concerning mines will be found to illustrate subjects so diverse as compulsory sale, the law of neighbourhood and nuisance, of servitude, of watercourses, and of limited estates." [1] And it may be added that the sphere within which the law draws illustration from disputes on questions arising out of the extraction of minerals by mining and otherwise is not confined to matters such as those mentioned, which are more or less closely related to the law of heritable estate. It extends to departments of the law of contract, in regard to such matters as the statutory restrictions on hours of labour, and regulations for safety and for securing fairness in remuneration of labour; [2] of reparation [3] (in which some of the most difficult and interesting questions of collaborateur [4] and contributory negligence have arisen out of the conditions of employment in mines); and of workmen's compensation, the principles of which in an exceptional degree find illustration in cases arising out of accidents in mines. It is obvious, however, that, inasmuch as the decisions arising out of such disputes are related to mines and minerals incidentally rather than essentially, their influence on the law will be considered more appropriately in the articles upon the various specific branches of law in question. The numerous statutory enactments, too, lend themselves to treatment (in so far as they can be conveniently dealt with in a work like this) in considering the particular aspects of employment which they affect. But there remain certain broad points of specialty in the law of minerals, mainly considered as subjects of property, and of mines as the means by which for the most part minerals can be extracted and turned to advantage, which call for separate treatment; and it is these with which it is proposed here to deal.

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[1] Rankine, Land-Ownership, 4th ed., x. 164.

[2] E.g. *Dobbie* v. *Coltness Iron Co.*, 1920 S.C. (H.L.) 121; *Sneddon* v. *Addie & Sons' Collieries*, 1927 S.N. 164.

[3] *E.g.* such recent cases as *Connell* v. *James Nimmo & Co., Ltd.*, 1924 S.C. (H.L.) 84; *Dumbreck* v. *Addie & Sons' Collieries*, 1928 S.C. 547; 1929 S.C. (H.L.) 51.

[4] *Park* v. *Wilsons & Clyde Coal Co.*, 1929 S.C. (H.L.) 38.

SECTION 2.—NATURE AND DEFINITION OF MINES AND MINERALS.

2. While it has been laid down that the primary meaning of "mine" standing alone is an underground excavation for the purpose of getting "minerals,"[1] and it has been said that primarily the expression "minerals" signifies what has been dug out of a "mine,"[2] there is nevertheless no one sharp legal definition of either "mine" or "minerals" which can be treated as generally applicable to every case. On the contrary, each of these terms is susceptible of limitation or expansion according to the context in which it occurs; and in construing it, regard must be had not merely to the deed or statute in which it is found, but also to the relative positions of the parties and the substance of the transaction or arrangement which the deed or statute embodies.[3] It is therefore necessary to consider the modifications of meaning to which these conditions may give rise. As each, in the primary definitions above cited, is defined by reference to the other, it would appear to be immaterial which is taken first. But inasmuch as "mine" even in its less restricted uses is never wholly dissociated from minerals, whereas "minerals" is not uncommonly employed as descriptive of substances other than those recovered by mining, "mine" presents narrower limits of deviation, and may therefore appropriately be considered in the first instance.

SUBSECTION (1).—*Meaning of "Mine," "Mines," "Quarry," "Pits."*

3. As above observed, the primary meaning of "mine" when standing alone has been defined as being "an underground excavation for the purpose of getting minerals."[1] "Underground" is the mark which distinguishes a mine from a quarry. "When we speak of mines in this country there is always some reference more or less direct to underground working."[4] From being applied to the excavation, the term began to be applied to the place where excavation occurred, and by an easy transition to the place where excavation would occur, without regard to actual excavation. Indeed it is in this sense that it is now generally used in Acts of Parliament. The growth of secondary meanings attaching to the expression, and their extent, is most concisely stated by Lord Macnaghten in a passage just preceding the words cited above: "The meaning of the word 'mines' is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral, it means little more than veins or seams or strata of that mineral." [1] While this is so when the term is used of unopened mines, the question may arise in the form whether a particular use of it is intended to extend to unopened mines. In the old case of *Astry* v. *Ballard* [2] it was laid down that a grant of "lands and mines," where some of the veins in question were open and some hidden, would only pass the open veins, it being observed that in strictness a mine is not "properly so called until it is opened. It is at best but a vein of coals before." Having regard to the dicta cited above, one ventures to doubt whether so strict a view would find favour at the present time.[3] In the phrase "all that mine, vein, or seam of coal," the word mine includes the stratum as well as the mere excavation. As a rule the widest signification of the term will be given to it unless it is controlled by the context, or unless the relative positions of the parties, or their intention, or the substance of the transaction indicate otherwise.[4] When used in contradistinction to other mining terms (*e.g.* to "vein," "seam," "lode") the meaning may vary.[5]

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[1] *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, 1882, 20 Ch. D. 552; *Bell* v. *Wilson*, 1866, L.R. 1 Ch. 303; *Rex* v. *Inhabitants of Sedgley*, 1831, 2 B. & Ad. 65; *Rex* v. *Brettell*, 1832, 3 B. & Ad. 424.

[2] See *Proud* v. *Bates*, 1865, 34 L.J. (Ch.) 406, at p. 411.

[3] *Glasgow Mags.* v. *Farie*, 1887, 14 R. 346; 1888, 15 R. (H.L.) 94, at p. 99; *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, *supra*, at p. 555.

[4] See per Lord Macnaghten in *Glasgow Mags.* v. *Farie*, 1888, 15 R. (H.L.) at p. 106.

4. Where the substance is obtained by underground workings, the place it has been taken from is, as has been seen, ordinarily described as a "mine." But if it is got by workings and excavation upon the surface of the ground, the place is designated a "quarry." [6] In *Darvill* v. *Roper*,[6] Vice-Chancellor Kindersley said: "We know this, that a mine properly speaking is that mode of working for minerals by diving under the earth and then working horizontally or laterally; whereas a quarry is where the working is *sub dio*. There is not the slightest doubt in my mind as to the difference between them." [6] This statement was cited with approval in *Glasgow Mags.* v. *Farie* [7] by Lord Macnaghten, who referred also with approval to the dictum of Kay J. in the case of the *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*,[1] that a bed of valuable clay which had three or four feet of surface earth above it, except at one point where it cropped out, was "in no sense a mine, being got entirely by open workings." Ordinarily, directly one ceases to work from the surface and starts to carry on subterranean work, the place ceases to be a quarry.[2]

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[1] *Glasgow Mags.* v. *Farie*, 1888, 15 R. (H.L.) at p. 106; and see also *Ramsay* v. *Blair*, 1876, 1 App. Cas. 705, per Lord Selborne; *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. at p. 266.

[2] 1677, 2 Mod. 193.

[3] But *cf.* MacSwinney on Mines, etc., 5th ed., p. 1, on this, and also for an interesting discussion on the relation of "mines," "veins," and "seams."

[4] Cf. *Glasgow Mags.* v. *Farie, supra*; *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, 1882, 20 Ch. D. 552.

[5] *Astry* v. *Ballard*, 1677, 2 Mod. 193.

[6] *Rex* v. *Brettell*, 1832, 3 B. & Ad. 424, at p. 426; *Darvill* v. *Roper*, 1855, 3 Drew. 294; *Bell* v. *Wilson*, 1865, 2 Drew. & Sm. 395; 1866, L.R. 1 Ch. 303; and cases cited *supra*, n. 4.

[7] 1888, 15 R. (H.L.), at p. 106.

5. But this general rule may suffer qualification by reference to the substance wrought. Thus the word "mine" is sometimes used for an open working where the substance to be obtained is commonly got by underground working, and *vice versa* where it is one commonly got by open working.[3] So in a question of assessment under 5 & 6 Vict. c. 35, s. 60, Schedule A, Nos. 3 and 4, it was held that underground workings for slate were assessable under head No. 3 as quarries, not under No. 4 as mines.[4] In a recent valuation case [5] it was held that houses owned by a colliery company and let to miners in their employment were not "mines, minerals, and quarries, including any lands and heritages contiguous thereto used wholly or mainly for the purposes of the business of working the mines, minerals, and quarries" within the meaning of the First Schedule to the Rating (Scotland) Act, 1926.[6] In a case [7] arising out of an arbitration brought under the Coal Mines (Minimum Wages) Act, 1912,[8] on a dispute under which of two county districts under s. 2 (5) of the Act a colliery fell to be included in fixing wages, it was found by Bailhache J. that it had been established that in fact "pits" was used to denote (*a*) the shafts, (*b*) the underground workings with or without the shafts, and (*c*) the colliery as a whole; that the primary meaning of the word was the shafts; that in the Act the word "pits" was used to mean the shafts by which the men came up and went down; and that therefore the colliery was for the purpose of wages regulation within the subdivision in which these shafts were situated.

6. In the Mining Code where the term mine is not specially defined, it is capable of variation according to the context.[9] Those sections of the Railway Clauses Consolidation and Waterworks Clauses Acts,[10] which are prefaced by the words "and with respect to mines lying under or near" the railway or canal, etc., have comparatively recently been the subject of close judicial examination. The result of the cases [11] appears to be that in the section by which the undertakers are, except on express purchase, "not entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works," the term "mines" includes quarries;[1] that when "minerals" is contrasted with "mines" it means minerals other than those got by underground working;[2] and that when the context so indicates, "mines" may be equivalent to "mines and minerals," as in the clause providing for giving notice of intention to work.[3]

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[1] 1882, 20 Ch. D. 552.

[2] *Brown* v. *Chadwick*, 1857, 7 Ir. C.L.R. 108; *Listowel* v. *Gibbings*, 1858, 9 Ir. C.L.R. 223; *Cleveland* v. *Meyrick*, 1867, 16 W.R. 104.

[3] See as to slate, *Jones* v. *Cwmorthen Slate Co.*, 1879, 4 Ex. D. 97; affd. 5 Ex. D. 93.

[4] *Jones* v. *Cwmorthen Slate Co.*, 1879, 5 Ex. D. 93.

[5] *Cadzow Colliery Co.* v. *Assessor for Lanarkshire*, 1928 S.C. 444.

[6] 16 & 17 Geo. V. c. 47.

[7] *Lofthouse Colliery* v. *Ogden*, [1913] 3 K.B. 120.

[8] 2 & 3 Geo. V. c. 2.

[9] *Glasgow Mags.* v. *Farie*, 1887, 14 R. 346.

[10] 8 & 9 Vict. c. 33; 10 & 11 Vict. c. 17.

[11] *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, 1882, 20 Ch. D. 552; *Glasgow Mags.* v. *Farie, supra*; *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; *Ruabon Brick Co.* v. *Great Western Rly. Co.*, [1893] 1 Ch. 427; *North British Rly. Co.* v. *Budhill Coal and Sandstone Co.*, 1910 S.C. (H.L.) 1.

7. In construing s. 18 of the Waterworks Clauses Act, 1847,[4] Lord Watson said:[5] "In these enactments the word 'mines' must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for waterworks or railway purposes, the undertakers or the company acquire, in my opinion, no right save to use that part of the surface—they acquire no right to the minerals themselves, except in so far as these are dug out or excavated in order to construct their works."

SUBSECTION (2).—*Meaning of "Open" Mine or Quarry.*

8. The connotation of the word "open" is here quite different from that attaching to it in a previous paragraph,[6] where in connection with "workings" it was used as pointing to the broad distinction between a mine on the one hand and a quarry on the other. In contrast to this, "open" in what here follows is descriptive of a mine or quarry which is in course of being "wrought" as a going concern, as distinct from one in which working has never been commenced or has been abandoned. The question whether a mine or quarry is "open" in this sense is of importance; for example, in relation to such questions as those of extent of liferent and other forms of limited estate;[7] and also occasionally in interpreting the extent of grants or reservations of mines and minerals.[8]

9. In such cases the test is whether the mine or quarry has been legally set apart by one lawfully entitled to do so for the purpose of making a profit from the produce; and to constitute a mine "open," working must have actually commenced and not have been abandoned. Dedication of the profit may be proved by actual working, or by letting the mine for the purpose of working.[9] Working must have actually commenced; mere preparation for opening is not sufficient,[10] nor is trial-boring.[1] A new seam in an open mine is regarded as open if it can be worked by the old shaft.[2] A mine or quarry is not necessarily open if the working of it has merely been for the purpose of supplying fuel or means of repair to some particular tenement, or for some other definite and restricted purpose.[3] Slight or casual use permitted to be had of outcropping minerals in a mine or quarry is not a ground for treating them as open. Thus mere permission given to tenants to scrape or scour for coal at places where it has cropped out at the surface will not suffice as a basis for treating the vein as an open mine; [4] nor the casual carrying away of gravel from a gravel pit for public uses by a surveyor of highways.[5]

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[1] *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; and *cf.* MacSwinney on Mines, etc., 5th ed., ss. 55 (8) and 1013.

[2] *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, 1882, 20 Ch. D. 552.

[3] *Midland Rly. Co.* v. *Robinson*, *supra.*

[4] 10 & 11 Vict. c. 17.

[5] *Glasgow Mags.* v. *Farie*, 1887, 14 R. 346, at p. 101.

[6] See para. 3, *supra.*

[7] See para. 53, *infra.*

[8] Cf. *Astry* v. *Ballard*, 1677, 2 Mod. 193.

[9] *Elias* v. *Griffith*, 1878, 8 Ch. D. 521; *Elias* v. *Snowdon Slate Quarries Co.*, 1879, 4 App. Cas. 454.

[10] *Viner* v. *Vaughan*, 1840, 2 Beav. 466.

10. Mines, though once opened, may cease to be so, and become abandoned or dormant, if it is established that the working of them has been discontinued, not from mere inability to carry them on at a profit, but with a view to the permanent advantage of the estate to which they belong.[6] If the workings have been relinquished from inability to work at a profit, the length of time which has elapsed since the abandonment of the working is generally the determining factor in deciding whether the mine is still open.[6] In the case of *Baillie's Trs.* v. *Baillie* [7] there are indications in the judgments of a tendency to regard the conditions more favourably in construing the gift of a liferent of the estate "and of minerals therein," than one in the form of a simple direction for a liferent of the proceeds of the estate without mention of minerals.

SUBSECTION (3).—*Definition of "Minerals."*

11. It may be true that primarily the word "minerals" signifies what is dug out of a mine.[8] But its legal significance goes beyond this, and is not confined to substances obtained from the ground by mines or underground workings. It is well settled that it includes also many substances obtained by means of open workings or quarries.[9] There is no single clear legal definition of the term "minerals." And indeed in one of the most recent cases Lord Chancellor Loreburn went so far as to say that "no definition of 'minerals' is attainable, the variety of meanings of what the use of the word 'minerals' admits being itself the source of the difficulty." [10] Similarly in an Irish case in which the question was exhaustively canvassed, Holmes L.J. observed that "in truth any attempt to lay down in a sentence a rule of general application to a subject which in its nature is so diversified and multiform can never be completely satisfactory. The definition is likely to include what ought to be excluded and to exclude what ought to be included."[1]

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[1] *Elias* v. *Snowdon Slate Quarries Co.*, 1879, 4 App. Cas. 454; *Stepney* v. *Chambers*, [1866] W.N. 401; *Huntley* v. *Russell*, 1849, 13 Q.B. 572.

[2] *Spencer* v. *Scurr*, 1862, 31 Beav. 334.

[3] *Elias* v. *Snowdon Slate Quarries Co.*, *supra*, at p. 465.

[4] *Stepney* v. *Chambers*, *supra*.

[5] See *Huntley* v. *Russell*, *supra*; and MacSwinney on Mines, 5th ed., p. 28, n. 1.

[6] *Viner* v. *Vaughan*, 1840, 2 Beav. 466; *Bagot* v. *Bagot*, 1863, 32 Beav. 509, at p. 517; *Baillie's Trs.* v. *Baillie*, 1891, 19 R. 220.

[7] 1891, 19 R. 220.

[8] *Proud* v. *Bates*, 1865, 34 L.J. (Ch.) 406, at p. 411.

[9] *Great Western Rly. Co.* v. *Carpalla United China Clay Co., Ltd.*, [1909] 1 Ch. 218; [1910] A.C. 83; *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; *Mags. of Glasgow* v. *Farie*, 1888, 15 R. (H.L.) 94.

[10] *Caledonian Rly. Co.* v. *Glenboig Fireclay Co.*, 1911 S.C. (H.L.) 72; cf. *Staples* v. *Young*, [1908] 1 Ir. Rep. 135, at p. 154.

12. Guidance as to its meaning must apparently be sought therefore, not from any one individual case, but from a consideration of the meanings which have been from time to time given to the expression in the varying circumstances of different cases illustrative of its meaning. There have been numerous decisions of weight in such cases, especially with reference to the meaning of "minerals" in the Railways Clauses Consolidation Act, 1845,[2] the corresponding Railways Clauses Consolidation (Scotland) Act, 1845,[3] s. 70, and the Waterworks Clauses Act, 1847.[4] Though many of these decisions happen to be pronounced upon those Acts forming part of the Mining Code, in so far as they enumerate principles for the definition of the content of the term "minerals," they are of general application in the interpretation of the term whether it occurs in a statute or in a private grant or reservation.

13. In *Great Western Rly. Co.* v. *Blades*[5] it was held that in a reservation of minerals by grant or contract a wider meaning should be given to the word than in a reservation under the Railway Acts. In *North British Rly. Co.* v. *Budhill Coal and Sandstone Co.*[6] Lord Gorell reviewed many of the leading authorities, and stated the various interpretations which had been or might be suggested. These were, he said, (1) that the term minerals includes everything except the vegetable surface, or everything except the mere surface which is used for agricultural purposes;[7] (2) that it includes everything below the soil and subsoil (interpretation suggested by the words used by Lord Watson in *Magistrates of Glasgow* v. *Farie*);[8] (3) that it includes every substance which can be got from underneath the surface of the earth for the purpose of profit;[9] (4) that it includes all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit and have a value independent of the surface of the land;[10] (5) that the words "other minerals" include minerals which can reasonably be said to be *ejusdem generis* with coal, ironstone, and slate, and that stone is *ejusdem generis* with slate;[1] (6) that these words are used in the ordinary sense in which they are understood, and used by landowners and those engaged in mining and commerce.[2] The last of these six interpretations was that accepted by all the judges in the House of Lords. The Lord Chancellor, after pointing out how impossible it was to reconcile all the various decisions enumerated and commented on by Lord Gorell himself, stated the grounds of his opinion thus:[3] "In the first place I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district; in the second place I think that in deciding whether or not in a particular case exceptional substances are minerals, the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow* v. *Farie*.[4] The Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral."

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[1] *Caledonian Rly. Co.* v. *Glenboig Fireclay Co.*, 1911 S.C. (H.L.) 72; cf. *Staples* v. *Young*, [1908] 1 Ir. Rep. 135, at p. 154.

[2] 8 & 9 Vict. c. 33. For the provisions of ss. 71 to 78 of this Act those of Part II. of the Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. IV. c. 20), have now been substituted as regards railways, but not as regards other undertakings to which the earlier Act applies. See COMPULSORY PURCHASE, Vol. IV. paras. 672 *et seq.*, *ante.*

[3] 8 & 9 Vict. c. 33. [4] 10 & 11 Vict. c. 17. [5] [1901] 2 Ch. 624.

[6] 1910 S.C. (H.L.) 1, at pp. 5 *et seq.*, reversing Court of Session judgment reported 1909 S.C. 277.

[7] *Midland Rly. Co.* v. *Checkley*, 1867, L.R. 4 Eq. 19, per Lord Romilly.

[8] 1888, 15 R. (H.L.) 94, at p. 101.

[9] *Hext* v. *Gill*, 1872, L.R. 7 Ch. 699, per Mellish L.J. at p. 712, where the definition was qualified by the words, "unless there is something in the context or in the nature of the transaction to give it a more limited meaning": *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, 1882, 20 Ch. D. 552; *Midland Rly. Co.* v. *Miles*, 1885, 30 Ch. D. 634; 1886, 33 Ch. D. 632.

[10] Lord Herschell in *Mags. of Glasgow* v. *Farie*, 15 R. (H.L.) at p. 102; see also *Johnstone* v. *Crompton*, [1899] 2 Ch. 190.

14. The same principle was approved in the later case of the *Caledonian Rly. Co.* v. *Glenboig Union Fireclay Co. Ltd.*,[5] in which the Lord President (Dunedin) thus stated his view of the propositions deducible from the *Budhill* case[6] and from *Great Western Rly. Co.* v. *Carpalla United China Clay Co*:[7]

1. Each case is a question of fact, and must be decided on its own circumstances.
2. Whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and landowners.
3. Nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question forming the ordinary subsoil of the district were held to be a mineral and within the exception.[8]

15. In the cases just noticed, it had been recognised that it had become impossible satisfactorily to reconcile the welter of varying decisions which had been pronounced from time to time during the preceding century in the Courts of the three countries and in the House of

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[1] See per Lord Watson in *Glasgow Mags.* v. *Farie*, 15 R. (H.L.), at p. 101; and per Lord Justice-Clerk Macdonald in *Glasgow and South-Western Rly. Co.* v. *Bain*, 1893, 21 R. 134, at p. 137.

[2] See per James L.J. in *Hext* v. *Gill*, 1872, L.R. 7 Ch. 699, at p. 719; and per Lord Halsbury in *Mags. of Glasgow* v. *Farie*, *supra*, at p. 95.

[3] 1910 S.C. (H.L.) at p. 4.

[4] *Hext* v. *Gill*, *supra*.

[5] 1910 S.C. 951; affd. 1911 S.C. (H.L.) 72.

[6] 1910 S.C. (H.L.) 1.

[7] [1910] A.C. 83.

[8] 1910 S.C., at pp. 961–962.

Lords as the common Court of Appeal. These had varied over distinctly marked periods; and even within each period they had not been consistent.[1] The earlier decisions were reviewed in the House of Lords in the *Budhill*[2] and *Glenboig*[3] cases, and the rules laid down in these must be taken as superseding the decisions and dicta in earlier cases in so far as inconsistent with these rules.

16. What may be regarded as the final word on this matter is to be found in a case decided in the House of Lords very shortly after the *Glenboig* case,[3] *Caledonian Rly. Co.* v. *Symington*,[4] in which the Lord Chancellor (Loreburn) said: "I am not about to repeat the law; it has been decided in this House in the *Budhill* and in the *Glenboig* cases; and there is an admirable exposition also in the Lord President's judgment in the *Glenboig* case." In *Symington's* case the House of Lords reversed a judgment of the Second Division which had in effect held that in no circumstances could the substance in question (freestone) be regarded as a mineral, and re-affirmed that the question—though one for the Court—was "always a question of fact," the Lord Chancellor observing "how the question whether freestone, or any other substance which might be found in the soil, is or is not a mineral within the meaning of the statute can be treated satisfactorily as a matter of law really passes my understanding. There is no method except to ascertain these things as matters of fact according to the rules that have been laid down."[5] The case was remitted to the Court of Session for proof, which was taken at great length. The judgment of Lord Cullen upon its effect must always remain a classical example of the application of the principles established by the House of Lords in the cases noticed.[6]

17. Although the question whether in any particular case a particular substance is included under the term "minerals" is thus one of fact to be decided by the Court on a review of the whole circumstances of the case, the decisions in the cases which have come before the Court remain of value as a guide to the circumstances under which a claim to have a substance included under the description is or is not likely to succeed. A reference to some of the more important of them is therefore given. The term "mineral" will in general (*i.e.* in the absence of any controlling context) include coal, ironstone, and ordinary metals. Shale has been treated as a mineral.[7] But in *Marquis of Linlithgow* v. *North British Railway Co.*[8] the Court held that in 1818, the date of the purchase in question, shale was not known and regarded by business men in Scotland as a mineral, and therefore refused to hold it to be such in lands purchased under a Canal Act of 1817.[9] This conclusion was reached upon evidence competently taken with reference to the usage at the time in question. But in the absence of sufficient evidence as to a usage different from that prevailing now, the present usage will be presumed to apply.[1]

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[1] *Cf.* for an interesting review of these periods MacSwinney on Mines, etc., 5th ed., i.

[2] 1910 S.C. (H.L.) 1.

[3] 1910 S.C. 951; affd. 1911 S.C. (H.L.) 72.

[4] 1912 S.C. (H.L.) 9; reversing 1911 S.C. 552.

[5] 1912 S.C. (H.L.), at p. 11.

[6] See 1913, 2 S.L.T. 294.

[7] *Lord Hopetoun* v. *North British Rly. Co.*, 1893, 20 R. 704.

[8] 1912 S.C. 1327.

[9] 57 Geo. III. c. 56, s. 112.

18. The term has in some circumstances been held to cover freestone.[2] But in *Menzies* v. *Earl of Breadalbane*[3] a reservation of the "haill mines and minerals" in a conveyance was held not to include freestone; and the same decision was given[4] where the reservation was of "the liberty of working coal and other metals, fossils, and minerals." Similarly in other cases, culminating in *Caledonian Rly. Co.* v. *Symington*,[5] in which in Lord Cullen's judgment on the proof there will be found a compendious summary of the whole position on the decisions regarding freestone.

19. In *North British Rly. Co.* v. *Budhill Coal and Sandstone Co.*,[6] the House of Lords held that in the circumstances of the case sandstone was not a mineral in the sense of s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845;[7] but this is not, of course, to be taken as deciding that in no case is it to be regarded as a mineral. The matter has to be tested by applying the principles laid down in this case and in the later case of *Glenboig Co.*,[8] as explained by Lord Chancellor Loreburn in *Caledonian Rly. Co.* v. *Symington.*[9]

20. Limestone,[10] stones,[11] flint,[12] slate[13] obtained by underground working, coprolites[14] and granite,[15] have been held to be minerals. So where lessees of granite quarries broke up small stones in a crusher, and paid royalty on every ton of "crushed granite manufactured" by them, it was held that the crusher was exempted by s. 4 of the Lands Valuation (Scotland) Amendment Act, 1895,[16] from entry in the valuation roll, in respect that it was a "structure" where "minerals" were "treated" and that the royalty was calculated on the minerals as treated therein.[17]

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[1] See per Lord Gorell in the *Budhill* case, 1910 S.C. (H.L.) 1, at p. 9; and per Loreburn L.C. in the *Glenboig* case, 1911 S.C. (H.L.) 72, at p. 73.

[2] Cf. *Glasgow and South-Western Rly. Co.* v. *Bain*, 1893, 21 R. 134; *Bell* v. *Wilson*, 1866, L.R. 1 Ch. 303; *Mawson* v. *Fletcher*, 1870, L.R. 6 Ch. 91; *Midland Rly. Co.* v. *Haunchwood Brick, etc. Co.*, 1882, 20 Ch. D. 552; *Jamieson* v. *North British Rly. Co.*, 1868, 6 S.L.R. 188; *Greville* v. *Hemingway*, 1902, 87 L.T. 443.

[3] 10th June 1818 F.C.

[4] *Duke of Hamilton* v. *Bentley*, 1841, 3 D. 1121.

[5] 1912 S.C. (H.L.) 9; 1913, 2 S.L.T. 294.

[6] 1910 S.C. (H.L.) 1.

[7] 8 & 9 Vict. c. 33.

[8] 1911 S.C. (H.L.) 72.

[9] 1912 S.C. (H.L.) 9, at p. 11.

[10] *Fishbourne* v. *Hamilton*, 1890, 25 L.R. Ir. 483; *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19.

[11] *Rosse* v. *Wainman*, 1845, 14 M. & W. 859; *Micklethwait* v. *Winter*, 1851, 6 Ex. 644; but see *Nisbet Hamilton* v. *North British Rly. Co.*, 1886, 13 R. 454, where the stones were of no market value.

[12] *Tucker* v. *Linger*, 1883, 8 App. Cas. 508.

[13] *Cleveland* v. *Meyrick*, 1867, 37 L.J. (Ch.) 125.

[14] *Attorney-General* v. *Tomline*, 1877, 5 Ch. D. 750; 1879, 15 Ch. D. 150.

[15] *Attorney-General* v. *Welsh Granite Co.*, 1887, 35 W.R. 617.

[16] 58 & 59 Vict. c. 41.

[17] *D. H. and J. Newall* v. *Kirkcudbright Assessor*, 1919 S.C. 468.

21. Sand and gravel have been held to be minerals under s. 1 of the Quarries Act, 1894;[1] but sand has been held not to come within the minerals reserved by deed.[2] Whinstone was decided by the Court of Session to be a mineral in *Forth Bridge Rly. Co.* v. *Dunfermline Guildry*,[3] but after the decision in the *Budhill* case the interlocutor was recalled of consent of parties.[3] This does not, of course, mean that under no circumstances can it be regarded as a mineral. But it does mean that the decision in the Court of Session in this case, as well as those in several of the cases cited, were influenced more or less by definitions of the word mineral that were rejected in the *Budhill*, *Glenboig*, and *Symington* cases, and that for the future in applying them they must be read in the light of the definitions and principles laid down in these cases.

22. Clay has been held to be a mineral, passing to a purchaser of lands as *pars soli*, and included in a general reservation of minerals.[4] And so a compulsory purchase of lands under the Railways and Waterworks Clauses Acts will not carry the clay therein if it is not part of the ordinary subsoil of the lands conveyed, "except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works," for the interpretation of which words see COMPULSORY PURCHASE.[5] But where clay is part of the ordinary subsoil of the district it has been held to be carried, and not to be exempted as mineral.[6]

23. Fireclay [7] and china clay [8] have been held to be minerals and excluded from conveyance; and similarly pipeclay was held to be excluded from a lease of lands where there was no express power to win it.[9] But again these decisions must be taken subject to the condition mentioned above. The Coal Mines Acts, 1887 to 1919, apply to mines of fireclay, and to clay not generally known as fireclay when worked by mine in the coal measures. The Metalliferous Mines Regulation Acts, 1872 and 1875, apply to clay wrought in other mines. For construction of special stipulations as to working of clay, see *Gordon* v. *Suttie* [10] and *Newton* v. *Nock*.[11]

24. An intention to restrict the meaning of a grant or reservation of mines or minerals will be inferred when effect cannot otherwise be given to a particular clause of a deed without destroying the meaning of a previous clause.[1] In doubtful cases of construction the meaning of the term may be limited by local usage, or such usage as that without it the deed or statute would be inconsistent.[2] Where the terms "mines" and "minerals" are both used in the same Act or deed, the word "minerals" is not on that account alone to suffer a limitation of its meaning.[3] Closely allied to, and indeed forming the basis of, the exclusion of the common subsoil of the district from exemption under a general clause is the principle that the exception must not "swallow up the grant." [4] This consideration is important where the question under controversy is whether a particular substance is or is not included within such words as "or other minerals." But it does not operate to write out particular minerals which are specially mentioned in the clause of conveyance or exclusion (as, *e.g.*, "coal, iron-stone, and salt"). In such a case what is provided for must be given effect to, though it may result in "swallowing up the grant" (or reservation).[5]

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[1] 57 & 58 Vict. c. 42; see *Scott* v. *Midland Rly. Co.*, [1901] 1 K.B. 317.

[2] *Staples* v. *Young*, [1908] 1 Ir. R. 135.

[3] 1909 S.C. 493; revd., of consent, 1910 S.C. 316.

[4] *Midland Rly. Co.* v. *Checkley*, 1867, L.R. 4 Eq. 19; *Errington* v. *Metropolitan Rly. Co.*, 1881, 19 Ch. D. 559, at p. 571; *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19.

[5] See Vol. IV. p. 290, *ante*.

[6] See *Mags. of Glasgow* v. *Farie*, 1887, 14 R. 346; 1888, 15 R. (H.L.) 94; *Great Western Rly. Co.* v. *Blades*, [1901] 2 Ch. 624; *Todd Birleston & Co.* v. *North-Eastern Rly. Co.*, [1903] 1 K.B. 603; *North British Rly. Co.* v. *Turners Ltd.*, 1904, 6 F. 900; *Skey* v. *Parsons*, 1909, 101 L.T. 103.

[7] *Glenboig* case, 1911 S.C. (H.L.) 72; and see *Errington* v. *Metropolitan Rly. Co.*, *supra*.

[8] *Great Western Rly. Co.* v. *Carpalla United China Clay Co., Ltd.*, [1909] 1 Ch. 218; [1910] A.C. 83 (in which the clay in question "occupied only a small fraction of the subsoil"); *Hext* v. *Gill*, 1872, L.R. 7 Ch. 699.

[9] *Colquhoun* v. *Watson*, 1668, Mor. 15253.

[10] 1837, 15 S. 549.

[11] 1880, 43 L.T. (N.S.) 197.

SECTION 3.—MINES, ROYAL AND BASE.

25. It was enacted by what a high authority [6] has described as "the original" Act of Annexation of Mines (1424, c. 12), that "gif onie mine of gold or silver be founden in onie lordis landes of the realme, and it may be prooved that three halfe-pennies of silver may be fined out of the pound of leade, the Lords of Parliament consentis that sik mine be the kingis, as is usual of other realmes." It is a debatable point whether this statute is the basis of the Crown right or whether it is merely declaratory of the common law, as is perhaps suggested by the use of the word "consentis," and the reference to the custom of other realms.[7] At any rate, the Act indicates that the only mines *inter regalia* at that time were those specified, and base mines have been regarded as a part and pertinent of lands under a Crown grant.[8]

26. The next Act, that of 1592, c. 31, assumed the existence of the right of the Crown with respect to all mines, and gave power to it to let the mines on payment of a tenth of the produce. But the effect of the Act, as construed by practice, was not to give the Crown a greater right to base mines than it had formerly, but merely to establish that gold and silver mines, until feued out, are the property of the Crown, and that when feued out the *reddendo* is to be a tenth of the produce.[1] The Crown was bound to grant the minerals to the owner of the lands if required;[2] and the right to a grant extends to one holding of a subject-superior.[3] The right to a grant from the Crown is a proper subject of declarator, and the Crown is not entitled, in derogation of the vassal's right, itself to work the minerals or to set them in feu or tack to any person other than the landowner.[4] Where a grant of lands has once been made, an adjudication of the lands without mention of the mines carries the mines, in preference to a subsequent adjudication of lands with express mention of them.[5] In *Lord Breadalbane's* case[6] a proprietor of lands obtained from the Crown, in terms of the Act 1592, c. 31, a separate charter of the mines of gold and silver and other metals and minerals in his lands. Subsequently he executed an entail, without mention of the mines and minerals. It was held that they were brought under the entail; but this on account of the vassal's intention in taking the grant, not by consolidation *ipso jure* by the Crown grant.

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[1] *Attorney-General* v. *Welsh Granite Co.*, 1887, 35 W.R. 617; *Bell* v. *Wilson*, 1866, L.R. 1 Ch. 303.

[2] *Darvill* v. *Roper*, 1855, 3 Drew. 294; *Tucker* v. *Linger*, 1883, 8 App. Cas. 508; *Attorney-General for Isle of Man* v. *Mylechreest*, 1879, 4 App. Cas. 294.

[3] *Mags. of Glasgow* v. *Farie*, 1888, 15 R. (H.L.) 94; *Ruabon Brick Co.* v. *Great Western Rly. Co.*, [1893] 1 Ch. 427.

[4] *Cf.* per Lord Pres. Dunedin in *Caledonian Rly. Co.* v. *Glenboig Union Fireclay Co., Ltd.*, 1910 S.C. 951, at p. 962; and see *North British Rly. Co.* v. *Turners Ltd.*, 1904, 6 F. 900.

[5] Cf. *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; and see Lord Cullen's judgment in *Caledonian Rly. Co.* v. *Symington*, 1913, 2 S.L.T. 294.

[6] Lord Curriehill (II.) in *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R. 826, at p. 829.

[7] See Rankine, Land-Ownership, 4th ed., x. 164; and *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R. 826.

[8] *Anstruther* v. *Anstruther*, 1796, 3 Pat. 483; *Lord Burly* v. *Sime*, 1662, Mor. 9630.

SECTION 4.—OWNERSHIP IN MINES AND MINERALS.

SUBSECTION (1).—*General Principles.*

27. Mines and minerals not yet separated from the soil are *partes soli.* Where there has been no separation of surface and underground estate, the owner of the surface is owner *ad centrum.*[7] Accordingly, mines and minerals (with the exception of royal mines when not granted expressly in the first instance by the Crown)[8] are included in a grant of "lands" from the Crown, and when not specially reserved they are presumed to be included in a disposition from a subject-superior.[9] They pass as part and pertinent of the lands.[10] Coals were held to have been carried by possession under a clause of parts and pertinents, against one infeft in the coal-heughs.[11] But in the early case of *Anstruther* v. *Anstruther*,[12] a mere grant of lands, and possession of the surface without possession of the coal, did not prevail against a grant of the lands with the coal, followed by possession of the coal, where the original circumstances of the former grant were consistent with the probability that the grant was of the surface as an agricultural subject only and that the minerals were not intended to be carried. And in the later case of

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[1] *Cf.* per Lord Curriehill in *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R. 826, at p. 829.

[2] *Earl of Hopeton* v. *Officers of State*, 1750, Mor. 13527.

[3] *Duke of Argyle* v. *Murray*, 1739, Mor. 13526.

[4] *Earl of Hopeton* v. *Officers of State*, 1750, Mor. 13527.

[5] *Oughterlony* v. *Earl of Selkirk*, 1755, Mor. 164.

[6] 1875, 2 R. 826.

[7] *Glasgow City Rly. Co.* v. *MacBrayne*, 1883, 10 R. 894.

[8] *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R. 826.

[9] *Mitchell* v. *York Buildings Co.*, 1777, 6 Pat. 795.

[10] *Bruce* v. *Erskine*, 1716, Mor. 9642, where the disposition was of a "house, yards, and parks."

[11] *Lord Burly* v. *Sime*, 1662, Mor. 9630.

[12] 1796, 3 Pat. 483.

Cadells v. *Anderson*,[1] the circumstances of which were less equivocal, a similar decision was given. But if there has been no possession of the coal by either competitor the result will be different.[2]

28. In the case of a title to mineral estate being ambiguous, it may be interpreted by prescriptive possession. Possession of the surface may be possession of the minerals, but is not always so.[3] Working of coal in one parcel of lands conveyed separately, though in the same charter and under the same *reddendo* with another parcel in the same barony, is no proof of possession in other parcels.[4] The possession cannot establish a right which is contradictory to the terms of the grant; [5] and it must be full and continuous.[6] Where a title contains an express grant of the minerals, possession of the surface alone is sufficient to complete a prescriptive right to the minerals, the working of them being *res meræ facultatis*.[7]

SUBSECTION (2).—*Mines in Special Situations.*

(i) *Under Highways, Rivers, Lochs, Foreshore, and Sea-bed.*

29. Mines under highways belong to the owners of the adjacent lands, the middle line of the road being the boundary.[8] Road trustees do not acquire property in minerals unless expressly given.[9] Mines under a loch belong to the owner thereof. In case of different proprietors, if the titles are silent, each party owns the *solum ex adverso* of his lands to the middle,[10] ascertained by the ordinary state of the loch, "neither swelled by floods, nor decreased by any unusual drought," [11] still less by any artificial alterations executed within the prescriptive period either by the claimant himself or by another, whether with his acquiescence or against his will.[12] Property in mines under rivers is determinable on the rule of *medium filum*; [13] in non-tidal portions of navigable rivers this rule also holds; [14] in tidal portions it follows the law of foreshore.

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[1] 1803, 4 Pat. 532.

[2] *Millar* v. *Marquis of Lansdowne*, 1910 S.C. 618; *Cadell* v. *Allan*, 1905, 7 F. 606.

[3] *Fleeming* v. *Howden*, 1868, 6 M. 782; *Orr* v. *Mitchell*, 1893, 20 R. (H.L.) 27; *Millar* v. *Marquis of Lansdowne*, 1910 S.C. 618; *Cadell* v. *Allan*, *supra*.

[4] *Forbes* v. *Livingstone*, 1827, 6 S. 167; see also 1822, 1 S. 282; 1825, 1 W. & S. 657.

[5] *Officers of State* v. *Earl of Haddington*, 1831, 5 W. & S. 570; *Kerr* v. *Dickson*, 1840, 3 D. 154; affd. 1842, 1 Bell's App. 499.

[6] *Mitchell* v. *York Buildings Co.*, 1777, 6 Pat. 795; *Forbes* v. *Livingstone*, *supra*; *Cadells* v. *Anderson*, 1803, 4 Pat. 532.

[7] *Crawfurd* v. *Bethune*, 1821, 1 S. 111; *Craufurd* v. *Durham*, 1826, 4 S. 665; *Millar* v. *Marquis of Lansdowne*, 1910 S.C. 618.

[8] *Wishart* v. *Wyllie*, 1853, 1 Macq. 389.

[9] *Waddell* v. *Buchan*, 1868, 6 M. 690.

[10] *Cochrane* v. *Earl of Minto*, 1815, 6 Pat. 139; *Baird* v. *Robertson*, 1839, 1 D. 1051; *Scott* v. *Lord Napier*, 1869, 7 M. (H.L.) 35.

[11] *Dick* v. *Earl of Abercorn*, 1769, Mor. 12813; *Glen* v. *Bryden*, 1830, 8 S. 893; *Baird* v. *Robertson*, *supra*.

[12] *Graham's Tr.* v. *Boswell*, 1835, 1 D. 1053, n., and p. 1061; *Baird* v. *Robertson*, *supra*; *Cunninghame* v. *Dunlop*, 1838, 16 S. 1080.

[13] *Wishart* v. *Wyllie*, *supra*; *Bicket* v. *Morris*, 1864, 2 M. 1082; affd. 1866, 4 M. (H.L.) 44.

[14] *Orr Ewing & Co.* v. *Colquhoun's Trs.*, 1877, 4 R. (H.L.) 116.

Mines under the foreshore have been occasionally granted by the Crown, and are capable of being possessed by a subject.[1] They may be prescribed on a title if the description of the lands be flexible.[2] A right of property in foreshore minerals is carried by grant of the foreshore unless specially reserved;[3] by prescriptive possession under title of lands bounded by the sea;[3] or under a Crown charter which does not extend the vassal's right beyond high-water mark;[4] or by prescriptive possession under a title of lands *de facto*, though not expressly, bounded by the sea.[5] Mines below the sea have frequently been regarded as belonging to the Crown.[6] A grant of a barony with parts and pertinents does not carry submarine minerals *ex adverso* of the barony lands without prescription, but if the minerals under the bed of the sea have been openly worked from the barony lands for more than the prescriptive period, such possession may explain the grant as including them.[7]

(ii) *Under Glebes, Churchyards, and Commonties.*

30. Mines under glebes do not belong to the incumbent of the benefice for the time being in property to the effect of entitling him to appropriate to himself the produce of working them. But he may work them, the rents or other proceeds being accumulated for the benefice, and he enjoying the interest of the fund so accumulated. This is matter of decision in the case of marl and coal,[8] and the principle of these decisions is equally applicable to other minerals. Where certain lands had been held for over two centuries by trustees "for the use and benefit of the minister of the gospel serving the cure at the Kirk of Bo'ness," and in 1888 the minerals therein were leased for twenty years at a yearly rent of £25 or royalties, the Court held in a Special Case between the trustees and the minister that mineral rents or royalties should be accumulated and the income paid to the minister although strictly speaking the subjects were not glebe.[9]

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[1] *Agnew* v. *Lord Advocate*, 1873, 11 M. 309; *Millar* v. *Marquis of Lansdowne*, 1910 S.C. 618; *Lord Advocate* v. *Clyde Navigation Trs.*, 1891, 19 R. 174.

[2] *Duchess of Sutherland* v. *Watson*, 1868, 6 M. 199; *Young* v. *North British Rly. Co.*, 1887, 14 R. (H.L.) 53.

[3] *Cadell* v. *Allan*, 1905, 7 F. 606; *Lord Advocate and Ors.* v. *Lord Blantyre*, 1879, 6 R. (H.L.) 72; *Agnew* v. *Lord Advocate, supra.*

[4] *Buchanan and Another* v. *Lord Advocate*, 1882, 9 R. 1218.

[5] *Agnew* v. *Lord Advocate, supra*; *Lord Advocate* v. *Lord Blantyre, supra*; *Young* v. *North British Rly. Co., supra.*

[6] *Officers of State* v. *Smith*, 1849, 6 Bell's App. 487, per Campbell L.C. at p. 500; *The Franconia*, 1877, 2 P.D. 163, per Coleridge L.C.J. at p. 173; and see *Gammell* v. *Woods and Forests Commrs.*, 1851, 13 D. 854; affd. 3 Macq. 419, 465; *Lord Advocate* v. *Hamilton*, 1852, 1 Macq. 46; *Lord Advocate* v. *Clyde Navigation Trs., supra*; *Cunninghame* v. *Ayrshire Assessor*, 1895, 22 R. 596; *Wemyss's Trs.* v. *Lord Advocate*, 1896, 24 R. 216; 2 F. (H.L.) 1.

[7] *Wemyss's Trs.* v. *Lord Advocate, supra.*

[8] *Minister* v. *Heritors of Maderty*, 1794, Mor. 5153; *Minister* v. *Heritors of Newton*, 1807, Mor. App. "Glebe," No. 6; *Durward Petr.*, 1886, 23 S.L.R. 322, where in granting authority to feu a glebe the Court appointed insertion of a reservation of the minerals, which were valuable.

[9] *Galbraith* v. *Minister of Bo'ness*, 1893, 21 R. 30.

31. Leases of minerals underlying glebes were commonly taken as between the heritors (or a committee representing them), the moderator and Clerk of the Presbytery, and the minister on the one part, and the lessees on the other; and sometimes a clause was inserted providing for the application of the rents (*a*) in payment of expenses of leasing and administration; (*b*) of 10 per cent. to the incumbent for the time being as compensation for disturbance to the amenity of the surface, and (*c*) by investment of the balance for payment of the income to the incumbent yearly.[1] An out-and-out sale of minerals underlying a specified portion of a glebe was held by the Court to be competent on approval of the heritors and presbytery being given, and the price being invested at their sight for the benefit of the successive ministers.[2] Interest on a bond representing a grassum paid in respect of a lease of minerals at a nominal rent was held to form part of the "rent of the benefice or stipend" within the meaning of the Act 1672, c. 13, and therefore a subject of ann.[3] Interest on the invested price obtained on a sale would doubtless be similarly treated. The powers of selling and leasing minerals under glebes will now fall to be exercised by the Church of Scotland General Trustees as an incident of the rights of administration vested in them as owners of the glebes under the Church of Scotland (Property and Endowments) Act, 1925,[4] subject to the rights of incumbents in office at the date of that Act, and to the control of the General Assembly, which may give direction as to the application of the proceeds within the limits provided for in s. 36 of the Act.

32. It has been said that mines under (parochial) churchyards "belong to" the heritors, who may work them if that can be done without interfering with the proper use of the ground. The proceeds must be used for some parochial purpose.[5] This qualification shews that it is only in a very qualified sense that such mines can be said to "belong to" the heritors. And Sir George Mackenzie is said by Brown [6] to have stated this doubt: "Query. To whom a coal found in a churchyard . . . will belong, whether to the heritors, the poor, the patron, or the minister?" Brown does not state the answer. There is a considerable weight of authority for holding that any right in the heritors was one of trust rather than property.[7] This would be consistent with such working of minerals as is above claimed for them. The property in any churchyard (whatever its nature) hitherto held by heritors (or by a kirk session) was transferred by the Church of Scotland (Property and Endowments) Act, 1925,[4] to the Parish Council of the parish,[8] by whom any rights of working or leasing minerals will now fall to be exercised. Such powers as they may have must be so exercised as to avoid disturbance of the ground for its appropriate purposes, and that even after the churchyard may have been closed for further interments.[1] Mines under commonty belong to the commoners.[2]

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[1] *Cf.* Parochial Ecclesiastical Law (Black and Christie), 1928, p. 328.

[2] *Minister* v. *Heritors of Tranent,* 1909 S.C. 1242; see also *Cadell* v. *Allan,* 1905, 7 F. 606.

[3] *Fyfe* v. *Thomson,* 1919 S.C. 380.

[4] 15 & 16 Geo. V. c. 33, ss. 30 (3) (*b*), 36, and 37; see Parochial Ecclesiastical Law (Black and Christie), 1928, at pp. 328, 329.

[5] Duncan, Parochial Law, p. 84; as to what may be held to be such purposes see Parochial Ecclesiastical Law (Black and Christie), 1928, p. 335.

[6] 5 Bro. Supp. 414.

[7] *Cf.* Parochial Ecclesiastical Law, *cit. supra,* pp. 239 *et seq.*

[8] 15 & 16 Geo. V. c. 33, s. 32.

SECTION 5.—SEVERANCE OF PROPERTY IN SURFACE AND PROPERTY IN MINERALS.

33. The property in minerals may be separated from the property in the surface (*a*) by grant of the minerals, reserving the surface; (*b*) by grant of the surface, reserving the minerals; and (*c*) by separate grants of surface and minerals to different people. When such separation takes place, however effected, the surface and the minerals become separate tenements with all the incidents of separate ownership. In practice the most common method of separation is by grant of the surface reserving the minerals.

34. When a superior feus lands and retains the minerals, these are excepted from the transmission, and were also excepted from the warrant for infeftment when such a warrant was expressed *ad longum*; and the minerals continue vested in the superior by virtue of his own title.[3] If such a superior thereafter conveys the superiority without expressly reserving the minerals, they will be included in the disposition of the superiority,[4] unless the context shews that this was not intended.[5]

35. A reservation may be either a right of property or a right of servitude.[6] A reservation of "all and singular the mines of coal . . . with full power to search," etc., is a reservation of property,[7] the powers of working being merely accessory.[8] A reservation expressed, "reserving . . . the privilege and liberty of mining coals, digging shanks," etc., was held to be a reservation of a servitude right.[9] Its effect has been characterised as a re-grant by the disponee of the rights, privileges, and facilities of which the servitude is made up.[10] A right of servitude only was instructed by a grant to a vassal of so much coal as would serve him and his family.[11] A declaration of a tenth of the output as a real burden on the lands was held a servitude right only.[12] But a reservation of full power to work, combined with a declaration that the vassal was not to have power to win coals, etc., was held to carry a right of property.[1] It has also been held that, where there is no plain indication to the contrary, a reservation of liberty of working means a reservation of property, and not merely the privilege of working.[2] In construing such reservation the rule prevails that everything passes which is not reserved.[3] Where one mineral is expressly reserved, the presumption is that the others pass with the grant.[4] Therefore if it is intended to reserve any substances otherwise than by general reservation all should be mentioned.[5] Attention to this is important where, as sometimes happens, the reservation is an exception in favour of the disponee, tacked on to a general reservation of minerals to the granter.

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[1] Cf. *Wright* v. *Earl of Mansfield*, 1824, 2 Sh. App. 104.

[2] *Johnston and Ors.* v. *Duke of Hamilton*, 1768, Mor. 2481; *Baird* v. *Kilsyth Feuars*, 1878, 6 R. 116; *Smyth* v. *Guthrie*, 1831, 9 S. 401.

[3] Menzies, Feudal Conveyancing, p. 571.

[4] Bell's Lectures, i. 611; *Cadell* v. *Allan*, 1905, 7 F. 606, per Lord Pres. Dunedin.

[5] *Orr* v. *Mitchell*, 1892, 19 R. 700; as revd. 1893, 20 R. (H.L.) 27.

[6] *Duke of Hamilton* v. *Graham*, 1871, 9 M. (H.L.) 98; and see *Baird* v. *Kilsyth Feuars*, 1878, 6 R. 116 (common property).

[7] *Simson* v. *Ker and Ors.*, 1792, 3 Pat. 238.

[8] *Smith* v. *Hamilton M'Gill*, 1768, Mor. 15266.

[9] *Davidson* v. *Duke of Hamilton*, 1822, 1 S. 411; and see *Duke of Hamilton* v. *Graham*, *supra*, at p. 104; and per Lord Brougham in *Turner* v. *Ballandene*, 1834, 7 W. & S. 163.

[10] *Duke of Hamilton* v. *Graham*, *supra*, at p. 102; and *Duke of Sutherland* v. *Heathcote*, [1891] 3 Ch. 504, at p. 516; [1892] 1 Ch. 475.

[11] *Harvie* v. *Lord Belhaven and Ors.*, 1870, 9 M. 129, at p. 146.

[12] *Dixons* v. *Buchanan*, 1825, 4 S. 355; 1829, 7 S. 324.

36. The nature and form of the reservation (whether of servitude, or right to win, or of property) may be of importance as regards the matter of wayleaves. Reservation of a mere servitude generally implies no right to the "chamber" in which the mineral is contained, to the effect of entitling the party in whose favour the reservation is contained to use it for the purpose of carrying through it minerals from adjoining lands of which he may be in right. And even where there is a reservation of mines and minerals in property this right has been questioned where, *e.g.*, the whole minerals reserved have been wrought out. It has been said that the granter of the conveyance with such reservation has no right in the space or shell which his working creates. The question seems to be one of construction of the deed as a whole; and the decisions have not been entirely uniform.[6]

37. As has been stated,[7] mines and minerals (with the exception of royal mines) are included in a grant of "lands" from the Crown, and when not specially excepted they are included in a disposition of lands from a subject-superior. When such a disposition was granted without reservation, "the coal" (or other minerals) "necessarily passed under the general description of the lands." [8] And it was equally well settled that in a contract for the sale and purchase of land the purchaser's right, if the missives were unqualified, was, in the absence of any circumstances inferring a contrary intention, to a conveyance of everything *a cœlo usque ad centrum.* "*Prima facie*, and if there was nothing else he was entitled to a complete right to the land, not only to the surface but to the minerals below and to whatever was above."[1] But it has been recognised that this *prima facie* right might be qualified if it could be shewn from the missives or from the surrounding circumstances that the parties knew that they were transacting in regard to land the minerals under which were the subject of reservation.[1]

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[1] *Bain* v. *Duke of Hamilton*, 1865, 3 M. 821; 1867, 6 M. 1.

[2] *Duke of Hamilton* v. *Dunlop*, 1884, 11 R. 963; affd. 1885, 12 R. (H.L.) 65; *Livingstone* v. *York Building Co. and Ors.*, 1776, 5 Bro. Supp. 559; affd. 1777; see 10 App. Cas. 816, n. 6, where a fuller report is given from the Lords' Journal of the case on appeal.

[3] *Menzies* v. *Earl of Breadalbane*, 1822, 1 Sh. App. 225; *Ramsay* v. *Blair*, 1876, 3 R. (H.L.) 41.

[4] *Simson* v. *Ker and Ors.*, 1792, 3 Pat. 238, at p. 243.

[5] *Forth and Clyde Navigation Co.* v. *Wilsons*, 1848, 11 D. 122.

[6] See MacSwinney on Mines, etc., 5th ed., p. 15, where the English decisions are enumerated; and *Duke of Hamilton* v. *Graham*, 1871, 9 M. (H.L.) 98, per Lord Colonsay at p. 114; *Baird* v. *Kilsyth Feuars*, 1878, 6 R. 116; *Simson* v. *Ker and Ors.*, 1792, 3 Pat. 238; *Davidson* v. *Duke of Hamilton*, 1822, 1 S. 411; *Dixons* v. *Buchanan*, 1825, 4 S. 355; 1829, 7 S. 324; *Cadell* v. *Allan*, 1905, 7 F. 606; see also para. 40, *infra.*

[7] Para. 27, *supra.*

[8] See per Lord Pres. Dunedin in *Cadell* v. *Allan*, *supra*, at p. 622.

38. The possibility of such a qualification of the contract of sale was most readily recognised in sales of urban subjects in areas in which there were known to be extensive mineral workings. It was enunciated by Lord Young in *Whyte* v. *Lee*,[2] and was given effect to in a number of subsequent cases,[3] the importance of which was enhanced by the very large extent of mineral working under towns in the industrial area, and by reason of the tendency which the cases seemed to shew to impute knowledge of the possibility of reservation to the purchaser of house or shop property in such a neighbourhood. This tendency was checked and corrected by the decision of the House of Lords on appeal from the decision of the First Division in *Crofts*' case;[1] which may be taken to have settled the law. Its result may be stated in two passages from the judgments of Lord Haldane and Lord Dunedin. The former said:[4] "It is always possible when a man buys a property which is named as 'No. 5 Milton Place,' or whatever else it may be, that he knows with some precision what it is that he is buying, and if he knows that it is a tenement which does not carry with it the title to minerals below ground, that may determine what is the meaning of the name under which he has bought, what it connotes. But then you have to shew that; for *prima facie* a contract of this kind gives a title to the whole property below, on the surface, and above. . . ." Lord Dunedin in concurring said:[5] "In an appropriate case I think there is much to be said for the opinion expressed by Lord Young in the case of *Whyte* v. *Lee*.[6] But in order to raise such a case it must be shewn, either by direct evidence or by inference from known circumstances, that the parties knew that they were bargaining for a house or tenement under which the minerals belonged to a third party. . . . There is no evidence that the pursuer knew anything of these conditions. They very materially affect the rights of the surface owner, and are such as, short of knowledge or acquiescence, any person would be entitled to reject." Lord Dunedin, moreover, expressly reserved his opinion whether *Whyte* v. *Lee*[6] "really laid down a universal rule, and if it did so, whether that universal rule is right." The decision of the House of Lords at any rate established that the rule, if rule there be, depends on knowledge by the buyer, and that the onus is on the seller to shew this. Failing his doing so, the buyer is entitled to resile before the transaction is carried through; and if he only discovers the reservation after execution and acceptance of a conveyance, he will be protected by the warrandice and may claim damages.[1]

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[1] *Crofts* v. *Stewart's Trs.*, 1927 S.C. (H.L.) 65, per Lord Haldane at p. 69.

[2] 1879, 6 R. 699.

[3] E.g. *Macdonald* v. *Newall*, 1898, 1 F. 68; *Gall* v. *Gall*, 1918, 1 S.L.T. 261; and the Court of Session (First Division) judgment in *Crofts* v. *Stewart's Trs.*, 1926 S.C. 891.

[4] 1927 S.C. (H.L.) at p. 69.

[5] *Ibid.*, at p. 71.

[6] 1879, 6 R. 699.

39. Where lands are feued in different parcels, reserving minerals, and without distinct specification of the boundaries, the onus is on the superior to prove to which lands the reservations apply.[2] In construing reservations the dispositive is the ruling clause, but in cases of ambiguity others may be looked at in interpreting it.[3] The intention of parties is to be gathered from the deed as a whole,[3] and in view of the circumstances at its date.[4] When reservations of mines and minerals have crept into or dropped out of a progress of titles, the Court has gone back to the original charter to ascertain the rights of superior and vassal.[5] The surface owner is entitled to make all lawful uses of his property, including an ordinary amount of building, and that irrespective of the mine-owner's potential right to use the surface, but if he overload the surface by erecting large factories or towns, he may have to take the risk of their weight in conjunction with mining operations bringing down the surface (see SUPPORT), and he is not entitled so to use the surface as to make mining practically impossible.[6] The mine-owner is entitled, *prima facie*, to enter on the surface of the land and sink pits, and if he has a right to work, expressly granted or reserved, he may erect machinery. He cannot destroy the surface by quarrying except by special stipulation.[7] The opposite rule applies under the Mining Code.[8]

SECTION 6.—WAYLEAVES AND USE OF MINES FOR TRANSPORT OF MINERALS.

40. A right to minerals has often attached to it a wayleave over the surface for conveying the minerals from the workings. Where a wayleave was granted before the invention of railways it was held that the right was not confined to such ways as were in use at the time of the grant.[9] The reservation of a right to coal, with the privilege of transporting, etc., and doing everything necessary thereanent, did not reserve a right to take materials out of the lands for a road for the transport of minerals.[10] When minerals have been partially removed and they belong in property to the mining company, or to those whom it represents, then the mining company may use the wastes formed by such partial removal for the transport of minerals in adjoining lands.[11] It was said, however, that if the mineral strata had been exhausted and the top of the subjacent strata had been used as a road for the conveyance of the minerals from the adjoining lands, the case would have been different.[1] The rule is different in the case of a lease (see Lease).[2] In *Blair*,[3] it was decided that while there may be a right in the owner of the minerals to cut through reserved strata for the purpose of removing the minerals conveyed, this could not entitle him to use these cuttings for the removal of minerals from other lands. In England it has been held that a reservation of mines and veins of coal included not only the coal but part of the strata below the coal. This gave the mine-owner right to use the wastes for the transport of coal from adjoining collieries.[4]

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[1] See also *Mossend Theatre Co.* v. *Livingstone*, 1929 S.N. 108.

[2] *Duke of Hamilton* v. *Graham*, 1872, 10 S.L.R. 61.

[3] *Fleeming* v. *Howden*, 1868, 6 M. 782 ; *Orr* v. *Mitchell*, 1893, 20 R. (H.L.) 27.

[4] *Bank of Scotland* v. *Stewart*, 1891, 18 R. 957.

[5] *Graham* v. *Duke of Hamilton*, 1842, 4 D. 482 ; *Boyd* v. *Bruce*, 1872, 11 M. 243 ; *Kerr* v. *Jobson*, 1840, 3 D. 154 (a case of ambiguity).

[6] *Welsh* v. *Macdonald*, 1896 (O.H.), 3 S.L.T. 304.

[7] *Hext* v. *Gill*, 1872, L.R. 7 Ch. 699.

[8] See COMPULSORY PURCHASE, Vol. IV. p. 261, *ante*.

[9] *Dand* v. *Kingscote*, 1840, 6 M. & W. 174.

[10] *Harrowar's Trs.* v. *Erskine*, 1827, 5 S. 307.

[11] *Duke of Hamilton* v. *Graham*, 1869, 7 M. 976; revd. 1871, 9 M. (H.L.) 98.

41. Where two proprietors let their coalfields to a third contiguous proprietor, and it was stipulated that he might communicate the workings on the lands let, he was held not entitled to communicate the workings on his own property.[5] The tenant of a coalfield under the sea, who worked it in conjunction with the coalfield under the adjoining property on shore, holding both of the shore proprietor, who in turn held the submarine minerals of the Crown, was held entitled to lead coals from the adjoining coalfield through the submarine coalfield, on the ground that under the leases he was entitled to work the two as one coalfield.[6]

Section 7.—Water Rights in Mines: Drainage.

42. A lower stratum is bound to receive water from a higher without the constitution of any servitude; but as this right may be overstretched in the use of it without necessity to the prejudice of the inferior ground, it is an arbitrary question how far it may be extended.[7] An upper heritor may make what use he pleases of surface water so long as he is making the natural use of his land.[8] But he is not entitled to lead the water by drains so as to place upon his neighbour's property what would not naturally have reached it;[9] nor can he drain it into his neighbour's mine either by raising the surface of the land,[10] or by obstructing an artificial watercourse,[11] or by opening sluices in his dykes.[12] If the result of draining be to flood a neighbouring mine, no liability will ensue therefor if it can be shewn that the draining operations were carried on in good faith, truly for the benefit of the estate, and in the ordinary administration thereof.[1] When underground water exists naturally in a mine, a mine-owner is entitled to get rid of it the best way he can, except that he may not be allowed, in certain circumstances, to throw more water down into a common stream than has hitherto flowed into it.[2]

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[1] *Duke of Hamilton* v. *Graham*, 1871, 9 M. (H.L.), per Lord Chancellor (Hatherley) at p. 105, and Lord Colonsay at p. 114; see also para. 21, *supra*, and MacSwinney on Mines, etc., as there cited for English cases.

[2] Vol. IX. p. 57, *ante*.

[3] *Blair* v. *Ramsay and Ors.*, 1875, 3 R. 25; affd. 1876, 3 R. (H.L.) 41.

[4] *Batten-Pooll* v. *Kennedy*, [1907] 1 Ch. 256; *Eardley* v. *Granville*, 1876, 3 Ch. D. 826; *Proud* v. *Bates*, 1865, 34 L.J. (Ch.) 406.

[5] *Mungall* v. *Bowhill Coal Co.*, 1900, 2 F. 1073.

[6] *Lord Advocate* v. *Glengarnock Iron, etc. Co.*, 1909, 1 S.L.T. 15.

[7] *Campbell* v. *Bryson*, 1864, 3 M. 254.

[8] *Chalmers* v. *Dixon Ltd.*, 1876, 3 R. 461, at p. 467.

[9] *Montgomerie* v. *Buchanan's Trs.*, 1853, 15 D. 853; *Baird* v. *Williamson*, 1863, 15 C.B. (N.S.) 376.

[10] *Hurdman* v. *North-Eastern Rly. Co.*, 1878, 3 C.P.D. 168.

[11] *Roberts* v. *Rose*, 1864, 3 H. & C. 162.

[12] *Whalley* v. *Lancashire and Yorkshire Rly. Co.*, 1884, 13 Q.B.D. 131.

43. Where water is accumulated underground as the result of the mining operations, this is the property of the mineral owner (or his tenant), and may (subject to the qualification above mentioned) be conveyed out to any part of the surface of which he has control—occupiers of adjoining lands having no right to insist that the water pumped to the surface shall be sent in the direction of the natural slope so as to discharge into a neighbouring stream. An averment that the water had been diverted from springs which formerly drained towards the stream was held not to be relevant to support an interdict.[3] But a mineral owner or tenant is not, apart from contract or prescriptive use, entitled to discharge water pumped from a mine into a stream, though this does not make the water of the stream unfitted for any of the primary purposes, but only for some special purpose;[4] and where he is draining mines below the land of several owners he cannot pump the water up and discharge it on the surface without consent of the surface-owner on whose land he proposes to discharge it.[5]

44. Water is a common enemy, against which each man must defend himself,[6] and no liability attaches to the escape of water by gravitation.[7] As each proprietor's right to work minerals extends to his march, if a coterminous proprietor is apprehensive of danger from an influx of water from an adjoining property it is his business to leave a barrier unworked to protect himself therefrom.[8] But this only applies to discharge from workings in the ordinary course of mining operations. An upper owner is not entitled to resort to a violent and disruptive method of working, such as, *e.g.*, exploding large charges of gunpowder with the view of getting rid of water.[9] If such explosions are liable to dislocate the lower *strata*, proof of this is enough to entitle an adjoining proprietor, whose mines may be detrimentally affected, to interdict, without any proof of actual dislocation being forthcoming.[9]

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[1] *Campbell* v. *Bryson*, 1864, 3 M. 254; *Rawstron* v. *Taylor*, 1855, 11 Ex. 369; *Broadbent* v. *Ramsbotham*, 1856, 11 Ex. 602; *Murdoch* v. *Wallace*, 1881, 8 R. 855.

[2] *Irving* v. *Leadhills Mining Co.*, 1856, 18 D. 833, per Hope L.J.-C. at p. 842.

[3] *Blair* v. *Hunter Finlay & Co.*, 1870, 9 M. 204.

[4] *Bankier Distillery Co.* v. *Young & Co.*, 1892, 19 R. 1083; affd. 1893, 20 R. (H.L.) 76.

[5] *Turner* v. *Ballandene*, 1832, 10 S. 415; affd. 1834, 7 W. & S. 163.

[6] *Smith* v. *Kenrick*, 1849, 7 C.B. 515.

[7] *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330, at p. 338.

[8] *Harvey* v. *Wardrop*, 1824, 3 S. 322; *Durham* v. *Hood*, 1871, 9 M. 474, at p. 479; *Scots Mines Co.* v. *Leadhills Mining Co. and Ors.*, 1859, 31 Sc. Jur. 571, per Campbell L.Ch. at p. 576; and *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418, per Inglis L.J.-C. at p. 1425.

[9] *Durham* v. *Hood*, 1871, 9 M. 474.

45. A mine-owner may not by his workings divert the course of a stream flowing in a defined course. It has been held in England that this applies even to underground watercourses.[1] But he cannot be held liable for interference with water percolating or diffused through the soil, even though this water would have gone to feed a well or a stream on a neighbour's land.[2] If a man digs a well, and his neighbour, whose land is on a lower level, afterwards opens a mine and the water flows into it, the owner of the well incurs no liability.[3] And if the workings of a mine-owner on a higher level are proper and usual, he is not liable for the descent of gravitation water into a lower mine.[4] But if he work in an extraordinary way, or increase the burden on the owner to the dip by negligent working, he will be liable.[5] And if he pump water from a lower part of his mine to a higher, and cause it to flow into his neighbour's mine, which would not otherwise have received it by gravitation, he incurs liability.[6] An upper mine-owner is not entitled to conduct water to the weak part of his neighbour's mine, and shelter himself behind the plea that the latter should have left a barrier.[7] If the burden of water be thus suddenly increased, the lower heritor is entitled to protect himself by down-casts filled with clay from the inroad of infiltrating water through a porous barrier, even though the result be to cause water to collect in the upper heritor's mine.[8]

46. The removal of the surface by a higher owner, if contrary to the usual practice of mining, may be such an improper working as to give the injured party a remedy, but not on the mere ground that it is a breach of a contract entered into between the higher owner and a third party.[9] But though a lower proprietor may prevent an upper heritor from discharging water on his land, he cannot hinder him from making an open cast in the upper land to drive a level to his coal, on the pretence that such a collection of water might be hurtful to him, nor can he stop the natural course of the water from going through his lower grounds.[10] One collecting on his land water which would not have been there naturally does so at his peril, and is *prima facie* liable for injury due to its escape.[1] This rule, however, does not apply in the case of statutory powers;[2] unless those authorised are guilty of negligence.[3] Similarly, where road trustees, having statutory powers to conduct water on to adjoining lands, constructed an artificial watercourse from the road into a quarry which was for the time being disused, by a channel which was used for upwards of sixty years, mineral tenants who complained that the water from the quarry so collected found its way into the workings were found not entitled to obstruct the channel unless they could shew that there was a better method of conveying the water from the road than that employed.[4]

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[1] *Wood* v. *Waud*, 1849, 3 Ex. 748; *Dudden* v. *Clutton Union*, 1857, 1 H. & N. 627; *Dickinson* v. *Grand Junction Canal Co.*, 1852, 7 Ex. 282, at p. 300; but see *Irving* v. *Leadhills Mining Co.*, 1856, 18 D. 833.

[2] *Blair* v. *Hunter Finlay & Co.*, 1870, 9 M. 204; *Chalmers* v. *Dixon Ltd.*, 1876, 3 R. 467; *Mags. of Linlithgow* v. *Elphinstone*, 1768, Mor. 12805; *Milton* v. *Glenmoray, etc. Distillery Co., Ltd.*, 1898, 1 F. 135; *Acton* v. *Blundell*, 1843, 12 M. & W. 324; *Chasemore* v. *Richards*, 1859, 7 Clark's H.L. Cas. 349; *Ballacorkish Mineral Co.* v. *Harrison*, 1873, L.R. 5 P.C. 49; *Broadbent* v. *Ramsbotham*, 1856, 11 Ex. 602.

[3] *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330.

[4] *Wilsons* v. *Waddell*, 1876, 3 R. 288; affd. 4 R. (H.L.) 29; *Bankier Distillery Co.* v. *Young & Co.*, 1892, 19 R. 1083, per Lord Pres. Robertson; *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418.

[5] *Durham* v. *Hood*, 1871, 9 M. 474; *Firmstone* v. *Wheeley*, 1844, 13 L.J. (Ex.) 361.

[6] *Baird* v. *Monkland Iron and Steel Co., Ltd.*, *supra*; *Turner* v. *Ballandene*, 1832, 10 S. 415; affd. 1834, 7 W. & S. 163.

[7] *Westminster Brymbo Coal, etc. Co.* v. *Clayton*, 1867, 36 L.J. (Ch.) 476, at p. 478.

[8] *Hope* v. *Wauchope*, 1779, Mor. 14538.

[9] *Wilsons* v. *Waddell*, 1876, 4 R. (H.L.) 29, at p. 31.

[10] *Aitken* v. *Dewar*, 1734, Elchies, *s.v.* "Property," No. 1.

47. In one case the question was raised whether a coal-owner to the rise was entitled to pierce a slip-dyke which, situated well within his march, had long prevented accumulated water from descending through his workings into his neighbour's mine to the dip, which was not protected by a barrier.[5] The question of right was not decided; but a Bill for interim interdict was passed and continued on appeal, which it would not have been had the act not been one outwith the ordinary course of current working of the minerals.[6] It was observed, that without casting doubt on the general rule that the owner of mines to the rise is entitled to work his mines in the ordinary course of working without regard to inconvenience which this may cause to the mines to the dip, it was a different question, and one of novelty and difficulty, whether where a large quantity of water had been accumulated over a course of time the tenants of the upper mine were entitled by boring through the containing strata suddenly to discharge the water on the lower workings, at least without the imposition on them of conditions for the benefit of the mineral owner lying to the dip.[7]

SECTION 8.—MEASURE OF DAMAGES FOR TRESPASS.

48. There are at least two well-recognised methods of assessing damages for wrongful working and abstraction of minerals. First, the value of the minerals may be taken at the pit mouth, allowing for the expenses of bringing to bank, but not for the expenses of winning; or, secondly, the value may be taken with an allowance for both winning and raising. These methods were first applied in England, and arose from distinctions between law and equity. On that account they have been regarded as not appropriate for general application in Scots law.[8] The English Courts have recognised a wide distinction between abstraction which takes place in good faith and that which is theftuous and done under cover of fraud. Accordingly, when abstraction has been effected through pure inadvertence,[1] under a *bona fide* belief of title,[2] fairly and honestly,[3] or under a mere mistake,[4] the trespasser has been allowed both the cost of severance and the cost of bringing to bank.[5] Where, however, the abstraction has been fraudulent,[6] negligent,[7] wilful,[8] or furtive,[9] the costs of severance have been disallowed to the wrong-doer.

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[1] *Kerr* v. *Earl of Orkney*, 1857, 20 D. 298; *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330.

[2] *Dunn* v. *Birmingham Canal*, 1872, L.R. 7 Q.B. 244, at p. 260.

[3] *Whitehouse* v. *Fellowes*, 1861, 30 L.J. (C.P.) 305.

[4] *Baird* v. *Stratton*, 1873, 11 S.L.R. 22.

[5] *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418; *Scots Mines Co.* v. *Leadhills Mining Co.*, 1859, 31 Sc. Jur. 571.

[6] *Baird* v. *Monkland Iron and Steel Co., Ltd., supra.*

[7] *Baird* v. *Monkland Iron and Steel Co., Ltd., supra*, per Inglis L.J.-C. at p. 1425.

[8] *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1895, 23 R. 45, per Lord Stormonth-Darling at p. 47.

49. The indemnification to which an injured party is entitled in such cases has in Scotland generally been measured in practice pretty strictly, according to the loss actually sustained, whether it has arisen from *bona fide* or surreptitious working;[10] and where the amount of damage done has been definitely ascertainable it has been valued accordingly.[10] But there are not wanting weighty dicta even in the cases in which this standard has been invoked which indicate that where there is the element of *mala fides* the standard may be more rigorously applied than where this is absent.[11] The particular methods by which effect was given to this consideration in some of the older common-law cases in England may have been dictated by technicalities which have not found recognition in the Scottish Courts.[12] But the legitimacy of the consideration itself has been clearly affirmed in the cases cited, and in terms which in no way suggest that the local area of its application is limited.[11]

50. Where a feu of lands extending to 1½ acres was granted, the superior not reserving the minerals (he having reserved the minerals in the surrounding lands and let them to tenants), both the tenants and the superior believed that the minerals in the 1½ acres were included in the mineral lease, and the tenants wrought them out. It was impossible for the feuar to have wrought them profitably himself. The proprietor was found entitled to the value of the minerals to him at the date of abstraction, and this was calculated at the rate of royalty of the surrounding coal, with an allowance for surface damages.[1] But the royalty was not, it was observed, itself the measure of damages; it was merely evidence of the value in the special circumstances, for the loss of which the mineral owner had to be compensated.[2] Where a railway company had wrongously excavated freestone reserved to the superiors, and had done so in the face of their title and after warning, all that the superiors were held entitled to was the market value of the abstracted freestone, less the cost of working. This was awarded, although in this case the superiors could not themselves have worked or let the freestone to a profit, and the only market value was that created by the railway company.[3] Where a landlord had intimated to his tenants his intention to resume possession in terms of the lease in consequence of unsatisfactory working, and, after a defended action, was found entitled to do so, it was held that his claim against his tenants for their possession in the meantime was for damages for breach of contract and not for violent profits.[4] But the opinions of the judges certainly do not (to say the least) negative the view that in circumstances slightly different the defenders might have been held liable in damages on a basis analogous to "violent profits."[5]

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[1] *Hilton* v. *Woods*, 1867, L.R. 4 Eq. 432.

[2] *Jegon* v. *Vivian*, 1871, L.R. 6 Ch. 742.

[3] *Wood* v. *Morewood*, 1841, 3 Q.B. 440.

[4] *Livingstone* v. *Rawyards Coal Co.*, 1879, 6 R. 922; 1880, 7 R. (H.L.) 1; *In re United Merthyr Collieries Co.*, 1872, L.R. 15 Eq. 46.

[5] *Trotter* v. *Maclean*, 1879, 13 Ch. D. 574.

[6] *Ecclesiastical Commrs.* v. *North-Eastern Rly. Co.*, 1877, 4 Ch. D. 845 (disapproved on another ground in *Bulli Co.* v. *Osborne*, [1899] A.C. 351).

[7] *Wood* v. *Morewood*, *supra*; *Martin* v. *Porter*, 1839, 5 M. & W. 352; *Morgan* v. *Powell*, 1842, 3 Q.B. 278; *Wild* v. *Holt*, 1842, 9 M. & W. 672; *Phillips* v. *Homfray*, 1871, L.R. 6 Ch. 770.

[8] *Martin* v. *Porter*, *supra*; *Llynvi Co.* v. *Brogden*, 1870, L.R. 11 Eq. 188; *Taylor* v. *Mostyn*, 1886, 33 Ch. D. 226.

[9] *Livingstone* v. *Rawyards Coal Co.*, *supra*; *Bulli Co.* v. *Osborne*, *supra*.

[10] *Houldsworth* v. *Brand's Trs.*, 1876, 3 R. 304; *Livingstone* v. *Rawyards Coal Co.*, *supra*; *Davidson's Trs.* v. *Caledonian Rly. Co.*, *supra*; and see *Duke of Portland* v. *Wood's Trs.*, 1926 S.C. 640; 1927 S.C. (H.L.) 1.

[11] See, *e.g.*, per Lord Curriehill (Ordinary) and Lord Justice-Clerk Moncreiff, at pp. 308 and 310 *et seq.*, in *Houldsworth* v. *Brand's Trs.*, *supra*; *Livingstone* v. *Rawyards Coal Co.*, 1880, 7 R. (H.L.) 1, per Lord Chancellor Cairns at p. 2; and in *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1895, 23 R. 45, per Lord Stormonth-Darling (Ordinary) and Lord Trayner, at pp. 45 and 47.

[12] See per Lord Stormonth-Darling as in last note; and per Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.*, 1880, 7 R. (H.L.) 1, at p. 8.

51. In a case[6] in which by their lease mineral tenants were bound "to leave the subjects at the end of their tenancy in good condition without accumulation of water in the workings, so as to enable the landlord or incoming tenant to pursue and carry on the workings," on the tenants leaving the mine flooded to a serious extent, the landlord claimed as damages the cost of putting the subjects into such condition as they would have been had the defenders implemented their contract. The latter maintained that the claim should be limited to the capitalised value of the royalties which would have been payable for the minerals rendered unworkable. Both in the Court of Session and the House of Lords this was rejected as the standard, and a proof before answer was allowed on the question of damage. It was not denied that the estimated royalties might be useful as evidence of damage. But it was pointed out[7] that "the measure of damage was the value of the covenant to the covenantee," and that what had to be done was to see "what loss had resulted to the covenantee from the breach." Though this was a case of breach of conditions in a lease, the principle laid down would seem to be applicable *mutatis mutandis* to the case of any wrongful flooding which interfered with the working of his mineral by an owner.

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[1] *Livingstone* v. *Rawyards Coal Co.*, 1880, 7 R. (H.L.) 1.

[2] *Ibid.*, per Lord Blackburn at 7 R. (H.L.), p. 10; and cf. *Duke of Portland* v. *Wood's Trs.*, 1927 S.C. (H.L.) 1, at p. 4, per Lords Shaw, Wrenbury, and Carson.

[3] *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1895, 23 R. 45.

[4] *Houldsworth* v. *Brand's Trs.*, 1876, 3 R. 304.

[5] See per Lord Curriehill (Ordinary), 3 R. at p. 308, and per Lord Justice-Clerk Moncreiff at pp. 310 *et seq.*

[6] *Duke of Portland* v. *Wood's Trs.*, 1926 S.C. 640; 1927 S.C. (H.L.) 1.

[7] *Ibid.*, 1907 S.C. (H.L.), p. 4, per Lord Wrenbury.

52. Where a trespass has been committed by the promoters of an undertaking, who have through mistake or inadvertence failed to purchase or pay compensation, they are not treated as trespassers if within six months of notice of a claim being made to them (or, in case of a disputed right, of such right being finally established) they purchase or pay compensation.[1]

SECTION 9.—LIMITED ESTATE IN MINES.

53. The tendency of the earlier decisions was to favour liferenters in mineral estate, but since it has become more valuable the tendency has been towards preservation of the fiars' rights. A tercer is not entitled to open new mines.[2] A liferenter by constitution was held not entitled to profits and rents arising from stone and lime quarries in lands over which the liferents were constituted where no mention had been made of these in the deed, and the lands were held under a strict entail.[3] A fiar may work mines on payment of surface damage, and having a due regard to the amenity of the mansion-house and estate.[4] A universal liferent to a wife of the whole annual produce and rents of the residue of her husband's heritable and moveable estate does not include income derived from minerals not wrought till after her husband's death.[5] A similar doctrine of intention was applied to a case of liferent by reservation.[6] Indeed the guiding principle seems to be the presumed intention in each case. Thus though a simple liferenter cannot work unopened mines, unless expression be given of a contrary intention, he may work open mines and a quarry to the extent of his own requirements, which includes coal for domestic use,[7] stones for the repair of dykes,[4] and lime for the fields,[8] for which he is entitled to break ground. And an inference displacing a rule which would normally prevail may be gathered from the tenor of a deed or contract, or even from surrounding circumstances. Thus the grantee of a general liferent of nothing but mineral estate is entitled to work minerals.[9] A proprietor who has leased minerals during his life, and grants a liferent of all lands and heritages, is presumed to include the mineral rents in the liferent.[10] Also when the estate was left as a *universitas*, rents of a clay pit were included.[9] In another case an old-going colliery under a lease at the date of the grant was included in the subjects of which a granddaughter of the testator was entitled to a liferent, the deed being a universal settlement with no directions for accumulations.[1] Under an English trust, on a petition by the trustees for powers to feu heritable estate, and also to grant mineral leases, the Court of Session granted the authority asked on it being shewn that the application was made with the sanction of the Court charged with the administration in England.[2] The danger of exhaustion of the minerals has an important bearing on the question of intention.[3] Though proceeds of unopened mines go to a fiar to the exclusion of the liferenter, the liferenter is entitled to them if the fiar has abandoned them as unworkable to profit.[4]

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[1] Lands Clauses Act, 1845 (8 & 9 Vict. c. 19), s. 117; *Caledonian Rly. Co.* v. *Davidson's Trs.*, 1900, 37 S.L.R. 406; 1902, 40 S.L.R. (H.L.) 98; [1903] A.C. 22.

[2] *Lord Lamington* v. *Lady Lamington*, 1682, Mor. 8240; *Belschier* v. *Moffat and Ors.*, 1799, Mor. 15863.

[3] *Swinton* v. *Duchess of Roxburghe and Another*, 1st February 1814 F.C.

[4] *Dickson* v. *Dickson*, 1823, 2 S. 152.

[5] *Campbell* v. *Wardlaw*, 1883, 10 R. (H.L.) 65.

[6] *Eiston* v. *Eiston*, 1831, 9 S. 716.

[7] *Lord Lamington* v. *Lady Lamington*, *supra*.

[8] *Duke of Roxburghe* v. *Duchess of Roxburghe*, 19th January 1816 F.C.

[9] *Guild's Trs.* v. *Guild*, 1872, 10 M. 911.

[10] *Waddell* v. *Waddell*, 21st January 1812, 16 F.C. 481; see also *Wardlaw* v. *Wardlaw's Trs.*, 1875, 2 R. 368; and *Strain* v. *Strain's Trs.*, 1893, 20 R. 1025 (followed in *Mein's Trs.* v. *Mein*, 1901, 3 F. 994).

54. An heir of entail in possession, in excambing lands, may reserve the minerals *hinc inde*.[5] Such an heir, being a limited fiar and not a bare liferenter, may work the minerals in the absence of prohibition.[6] Indeed, it is very doubtful if such prohibition would be given effect to.[7] Where a provision to a widow and children is granted in virtue of powers under an entail, and the provision is a certain portion of the free rents of the entailed estate, the rent of a coal and lime work must be taken into computation.[8] In fixing the free yearly rental of minerals the Courts formerly adopted a mode other than that expressed in the statute, and took the equitable view that mineral estate was in such a peculiar position with regard to exhaustion as to warrant them taking an average rental over a period of years.[9] But such rental is now to be calculated at the rate at which the mineral fields were let at the death of the grantor.[10]

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[1] *Wardlaw* v. *Wardlaw's Trs.*, 1875, 2 R. 368.

[2] *Pender's Trs., Petrs.*, 1903, 5 F. 504.

[3] *Ferguson* v. *Ferguson's Trs.*, 1877, 4 R. 532; see comments on this case in *Strain* v. *Strain's Trs.*, 1893, 20 R. 1025.

[4] *Baillie's Trs.* v. *Baillie*, 1891, 19 R. 220.

[5] *Hamilton* v. *Chancellor*, 1833, 12 S. 22.

[6] *Gordon* v. *Gordon*, 24th January 1811 F.C.

[7] *Muirhead* v. *Young's Trs.*, 1855, 17 D. 875; 1858, 20 D. 592.

[8] *Douglas* v. *Douglas*, 1822, 1 S. 408.

[9] *Wellwood* v. *Wellwood*, 1848, 11 D. 248; *Douglas* v. *Scott and Yorke*, 1869, 8 M. 360; *Christie* v. *Christie*, 1878, 6 R. 301.

[10] *Lord Belhaven and Stenton, Petr.*, 1896, 23 R. 423.

MINISTER.

MINISTER'S MAN.

See CHURCH.

MINORS AND PUPILS.

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SECTION 1.—DEFINITIONS.

55. A minor, speaking generally, is a person under the age of twenty-one years. In England such persons are in infancy. The word infant has no precise meaning in Scotland. The term is used, however, in certain statutes which apply to Scotland. In the Betting and Loans (Infants) Act, 1892, "infant" means and includes "any minor or pupil," [1] and in the Guardianship of Infants Acts, 1886 and 1925, the word means "pupil." [2]

56. In a stricter sense the word minor signifies a minor *pubes*—an individual between pupillarity and majority—that is, if a female, between the ages of twelve and twenty-one years, and, if a male, between fourteen and twenty-one years complete. Females under the age of twelve and males under the age of fourteen are pupils.[3] In calculating the age, the computation is made *de momento in momentum*; the maxim *Dies inceptus pro completo habetur* does not apply.[4] As the birth of every child must now be registered, an extract from the register of births is an important element in the proof of age, and is enough in practice, with a very moderate amount of additional evidence.[5]

57. While the law holds minors, in the stricter sense, to be capable of consent, and in many cases as fit to act as those who are *sui juris*, they are nevertheless treated as of inferior discretion and judgment, and entitled to special protection. Pupillarity, on the other hand, is in contemplation of the law "a state of absolute incapacity." [1]

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[1] 55 Vict. c. 4, s. 7.

[2] 49 & 50 Vict. c. 27, s. 8; 15 & 16 Geo. V. c. 45.

[3] Ersk. i. 7, 1.

[4] Ersk. i. 7, 36; Fraser, Parent and Child, p. 201.

[5] Ersk. i. 7, 36.

SECTION 2.—MINORS WITHOUT CURATORS.

SUBSECTION (1).—*Powers.*

58. Minors *puberes* are by the law of Scotland held capable of managing their own affairs without the authority or assistance of any third party; their deeds are as valid as those of majors, except that they may be reduced on the ground of minority and lesion within four years after majority.[2]

59. Subject to this qualification a minor without guardians may, *inter alia*, do the following acts: [3] "Enter into marriage [4] or other contracts; [5] become a partner of a company; [6] . . . grant bills, bonds, or other personal obligations; [7] borrow money and dispone his property in security of the payment; [8] let his heritage on lease; uplift his rents and interests; [9] be the petitioning creditor in a sequestration, or be himself rendered bankrupt and sequestrated; [10] sell his property, heritable and moveable, by his own deed, without judicial authority or the consent of his friends; [11] institute or defend actions in his own name,[12] but in such a case a curator *ad litem* will be forced upon him if he appear in the suit, but not if he do not enter appearance.[13] He may also . . . make a testament,[14] renounce a succession to which he is heir,[15] gift all his moveable property to whomsoever he may please, and incur a passive title by vitious intromission, which neither a pupil nor his tutor can." [16] A minor has also an absolute right to choose curators for himself.[17]

60. Although a minor may test on moveables, and dispose of his heritage for onerous causes, it is well settled that he cannot, even with consent of curators, alter the course of succession to his heritage by testing upon it,[1] or by gratuitously conveying it away, to the exclusion of his heir-at-law.[2] It has also been held that, when moveable debts have been conveyed to a minor, with a substitution to near relatives of the granter, the minor is prohibited from altering the substitution.[3] The above-mentioned rule regarding heritage, however, does not apply to subjects heritable merely *destinatione*,[4] nor to the proceeds of heritage sold by a factor *loco tutoris* in virtue of special powers;[5] and it seems clear that a minor may alter the succession to his heritage by an onerous transaction short of sale, such as a marriage contract.[6]

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[1] Bell's Prin., s. 2067.

[2] Stair, i. 6, 32; Ersk. i, 7, 33; Ersk. Prin. i. 7, 6; Bell's Prin., ss. 2088 *et seq.*; *Harvey* v. *Harvey*, 1860, 22 D. 1198, per Lord Justice-Clerk Inglis at p. 1208; *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[3] Fraser, P. & C., pp. 436–437.

[4] Ersk. i. 7, 33; see *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473.

[5] *Blythman* v. *Murray*, 1649, 1 Bro. Supp. 405; *Wilkie* v. *William Dunlop & Co.*, 1834, 12 S. 506; *Argo* v. *Smart*, 1853, 1 Irv. 250, per Lord Justice-Clerk Hope at p. 257.

[6] *Duncanson* v. *Duncanson*, 1715, Mor. 8928; *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[7] *Craig* v. *Grant*, 1732, Mor. 9035; *Waddell* v. *Gibson*, 18th January 1812, F.C.; *Campbell* v. *Turner*, 1822, 1 S. 266; *Crawford* v. *Bennet*, 1827, 2 W. & S. 608.

[8] *Dempster* v. *Potts*, 1836, 15 S. 364.

[9] Ersk. i. 7, 33, n.

[10] *Miller* v. *Aitken*, 1840, 2 D. 1112.

[11] Stair, i. 6, 44; Ersk. i. 7, 33; *Clerk's Crs.* v. *Gordon*, 1699, Mor. 3668; *Thomson* v. *Stevenson*, 1666, Mor. 8982.

[12] See ACTION, Vol. I. p. 64, *ante*.

[13] *Mackenzie's Tr.* v. *Mackenzie*, 1908 S.C. 995; see, however, comments on this case in *Drummond's Trs.* v. *Peel's Trs.*, 1929 S.C. 484.

[14] Ersk. i. 7, 33.

[15] *A.* v. *B.*, 1631, Mor. 8969; see, however, the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 12.

[16] *M'Eachern* v. *M'Eachern*, 1833, 11 S. 441.

[17] *Ferguson* v. *Blair*, 1908, 16 S.L.T. 284.

61. Questions have been raised whether a minor without curators can compel his debtor to pay, without giving some kind of security to indemnify the debtor,[7] and the decisions are contradictory.[8] It has been laid down that "no cautious debtor would venture to pay a minor without curators otherwise than *auctore prætore*";[9] and again, while it has been held that "a payment made to a minor not having curators is a valid and effectual payment,"[10] it has, on the other hand, been subsequently decided that a minor could not uplift a principal sum without curators or judicial sanction, though he might uplift the interests and profits.[11] As a party paying money to a minor must shew, in the event of an action of reduction, that it was employed *in rem versum* of the minor, the safe rule would be never to pay without authority of the Court, which might be done under suspension of a threatened charge,[12] or unless a guardian is appointed to concur in the discharge. Thus, the Government Stock Regulations contain no provision for the execution by a minor without curators of the various documents required in connection with such stock, and any minor holding such stock would in practice require to obtain a curator.[13] Where a minor pursuer recovers a sum of money in name of damages, the practice with regard to the disposal of the money has varied.[14]

62. Reference may competently be made to the oath of a minor,[15] but apparently not where the matter relates to a debt incurred by him when a pupil.[16] Where there are curators, the reference is notwithstanding to the minor's oath.[17]

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[1] *Cunynghame* v. *Whitefoord*, 1797, Mor. 8966; Ersk. i. 7, 33.

[2] *M'Culloch* v. *M'Culloch*, 1731, Mor. 8965.

[3] *Yorkston* v. *Burn*, 1697, Mor. 8950; *Waddel* v. *Waddel*, 1739, Mor. 8965.

[4] *Brand's Trs.* v. *Brand's Trs.*, 1874, 2 R. 258.

[5] *Brown's Tr.* v. *Brown*, 1897, 24 R. 962.

[6] *Muirhead* v. *Muirhead*, 1724, Mor. 8955.

[7] More's Lectures, i. 110.

[8] *Wait* v. *Panton*, 1697, Mor. 8971; *Morison* v. *Stewarts*, 1747, Mor. 8972; Mackay, Practice, ii. 127.

[9] *Hay* v. *Grant*, 1749, Mor. 8973.

[10] *Koehler* v. *Neidrick*, 1772, Mor. 8975.

[11] *Kirkman* v. *Pym*, 1782, Mor. 8977.

[12] *Kirkman*, *supra*; *Thomson* v. *Stevenson*, 1666, Mor. 8982; *Ruthven* v. *Gray*, 1672, Mor. 31.

[13] Finance Act, 1928 (18 & 19 Geo. V. c. 17), s. 34; Government Stock Regulations, 1929.

[14] See ACTION, Vol. I. p. 65, *ante*.

[15] *Earl of Mar* v. *His Vassals*, 1628, Mor. 8918; *Maitland* v. *Caschogill*, 1623, Mor. 8917.

[16] *Little* v. *Graham*, 1826, 4 S. 424.

[17] *Forbes* v. *Laird of Pitsligo*, 1628, Mor. 8920, 12479; Dickson on Evidence, s. 1407.

63. A minor may be imprisoned for non-implement of obligations *ad factum præstandum*, and might have been formerly for non-payment of debts.[1] The position of minors in relation to the criminal law has been discussed elsewhere.[2]

SUBSECTION (2).—*Disabilities.*

64. A minor is under disability mainly with reference to administrative duties, and cannot exercise any public right or franchise. He cannot, for example, be a town-councillor;[3] trustee on a sequestrated estate;[4] a judge in any Court, or an arbiter or oversman;[5] a juror;[6] a commissioner of supply,[7] or a county councillor,[8] though it appears he may be a sheriff-clerk depute;[9] and he cannot be a tutor, curator, or judicial factor,[10] though he may be trustee on a private trust.[11] He cannot be a Member of Parliament, though, on the legal presumption of majority, he may sit till displaced;[12] nor can he claim to be enrolled as a voter;[13] but if majority be reached before his qualification is considered in the Registration Court, it is enough.[14] Various other disabilities are imposed by special statutes and regulations.[15]

SECTION 3.—MINORS WITH CURATORS.

SUBSECTION (1).—*Powers requiring Curators' Consent.*

65. The position, rights, and powers of a minor under guardianship will be treated under the title TUTORS AND CURATORS. It is proposed here to consider specially the position of minors who, having curators, act without their consent. The general rule is that all *inter vivos* deeds and transactions relative to the minor's estate, heritable or moveable, without the curator's consent, are null and void so far as the minor is concerned.[16] The nullity is not limited to the *quadriennium utile*, but may be pleaded by the minor during the long prescription.[17] According to Fountainhall, whose view still prevails, the deed "is an act absolutely null of the law, needs no revocation, no reduction . . . imports lesion without any other probation." [18]

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[1] Ersk. i. 7, 47; *Thomson* v. *Ker*, 1747, Mor. 8910.

[2] See CRIME, Vol. V. pp. 56, 293, *ante*.

[3] *Kidd* v. *Magistrates of Anstruther-Wester*, 1852, 15 D. 257; 4 & 5 Geo. V. c. 39, s. 1.

[4] *Threshie*, 30th May 1815, F.C.; 3 & 4 Geo. V. c. 20, s. 64.

[5] Fraser, P. & C., p. 446.

[6] See *Glennan and Bradly*, 1830, 2 Sc. Jur. 382.

[7] *Hay* v. *Hepburn*, 1735, Mor. 8929.

[8] 4 & 5 Geo. V. c. 39, s. 1.

[9] *Heddel* v. *Duncan*, 5th June 1810, F.C.

[10] Ersk. i. 7, 12; *Marquis of Montrose*, 1695, 4 Bro. Supp. 277.

[11] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[12] 7 & 8 Will. III. c. 25, s. 7.

[13] 18 & 19 Geo. V. c. 12, ss. 1 and 7.

[14] *Campbell* v. *Richardson*, 1879, 7 R. 32.

[15] *E.g.* Law Agents Act, 1873 (36 & 37 Vict. c. 63), s. 5; Licensing (Scotland) Act, 1903 (3 Edw. VII. c. 25), s. 11.

[16] Stair, i. 6, 33; Bankt. i. 7, 56; Ersk. i. 7, 33; and see *Stevenson* v. *Adair*, 1872, 10 M. 919.

[17] *Robertson* v. *Oswald*, 1584, Mor. 8980; *Bell* v. *Southerland*, 1728, Mor. 8985; *Thomson* v. *Pagan*, 1781, Mor. 8985; *Manuel* v. *Manuel*, 1853, 15 D. 284.

[18] 2 Bro. Supp. 626.

66. The following acts done without the curator's consent have been found *ipso jure* null:[1] "Tacks,[2] bills, bonds, and dispositions or sales,[3] contracts,[4] cautionary obligations,[5] factories, commissions, or mandates,[6] and other deeds inferring an obligation against the minor's property, such as an obligation to pay money to his sister, constituted by her marriage contract,[7] assignations,[8] services of the minor as heir to an ancestor,[9] a renunciation to be heir to the ancestor;[10] and a payment of a debt made to a minor, without the consent of the curator, would not be a valid payment, so that the money could again be demanded by the minor and curators from the debtor,[11] unless the latter prove that the money had been applied for or *in rem versum* of the minor."[12] A receipt for payment of a debt ought to be signed by both minor and curator, though the money may competently be paid over to the latter. An indenture by a minor without consent of his father is thought to be not void, but only voidable on proof of lesion, and the cautioner is held bound.[13] The curators may interpone consent *ex intervallo*.[14] If the minor chooses to go on with the contract, it is incompetent for the other party to plead the nullity.[15]

SUBSECTION (2).—*Powers without Curators' Consent.*

67. The doctrine stated in the preceding subsection is not "so absolute as to undergo no qualification."[16] (1) It would appear that, without consent, a minor may do any act which does not affect the property under the curator's charge.[17] He may accordingly choose his own residence,[18] and may marry without the curator's (or his father's) consent.[19] If he refuses to implement a promise of marriage he will be liable in damages.[20] He may also test on moveables,[21] and, if no unfair means are used, may bequeath them to his curator.[22] This right, however, has been denied to the minor whose property, *e.g.* a bond, has been left with a substitution, and under a condition, express or implied, that he was not to alter the destination.[1] (2) Deeds remuneratory to the minor's advantage are upheld though his curators have not consented, and on this ground a marriage contract has been held a deed not to be set aside except on proof of lesion.[2] (3) Further, the minor, by his own conduct, may be barred from pleading the want of his curator's consent as a nullity. Thus if he fraudulently holds himself out as major,[3] or if, looking like a person of full age, he does not inform the other party,[4] or if he pretends that he has his curator's consent,[5] the minor's acts, though without consent, are binding. (4) If the creditor shews that the debt is for necessary furnishings,[6] or that the money is applied *in rem versum* of the minor,[7] this will obviate the want of the curator's consent. In similar circumstances acts by the curator alone will be sustained.[8] In transactions of small moment, or when no great advantage is to be gained, the Court will not interfere.[9]

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[1] Fraser, P. & C., pp. 494–495.

[2] *Lady Cardross* v. *Hamilton's Reps.*, 1708, Mor. 8951; revd. 1712, Robert. 37.

[3] *Hamiltons* v. *Hamilton*, 1587, Mor. 8981; *Campbell* v. *Lord Lovat*, 1731, Mor. 9035; *Kincaid*, 1561, Mor. 8979.

[4] *Thomson* v. *Pagan*, 1781, Mor. 8985.

[5] *Wall* v. *Brownlee*, 1724, Mor. 9035; *Drummond* v. *Cunningham-Head*, 1624, Mor. 3465.

[6] *Nisbet* v. *Dickson*, 1737, Elchies, "Minor," No. 5.

[7] *Maxwell* v. *Earl of Nithsdale*, 1632, Mor. 8942; see *Bruce* v. *Hamilton*, 1854, 17 D. 265; and *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473.

[8] *Craig* v. *Lindsay*, 1757, Mor. 8956.

[9] *Simpson* v. *Balgony*, 1627, Mor. 2729.

[10] *Bannatyne* v. *Roome*, 1664, 2 Bro. Supp. 362.

[11] Ersk. i. 7, 37; *Cuningham*, 1707, Mor. 16325.

[12] *M'Adam* v. *Laird of Lag*, 1605, Mor. 8939.

[13] *Stevenson* v. *Adair*, 1872, 10 M. 919; Ersk. iii. 3, 64; cp. *Low* v. *Henry*, 1797, Hume, 422.

[14] *Learmonth* v. *Leslie*, 1586, Mor. 16235; see *Tolquhoun* v. *Thoris*, 1683, Mor. 16305.

[15] Ersk. i. 7, 33; Bankt. i. 7, 56.

[16] *Bruce* v. *Hamilton*, 1854, 17 D. 265, per Lord Ivory.

[17] Fraser, P. & C., p. 489.

[18] *Harvey* v. *Harvey*, 1860, 22 D. 1198.

[19] Ersk. i. 7, 33; see *Bruce* v. *Hamilton*, 1854, 17 D. 265.

[20] *Whitehead* v. *Philipps*, 1903, 10 S.L.T. 577.

[21] Ersk. i. 7, 33; iii. 9, 15; *Yorkston* v. *Burn*, 1697, Mor. 8950.

[22] *Yorkston*, *supra*; *Stevenson* v. *Allans*, 1680, Mor. 8949.

68. Since the minor is able to act for himself, and there is no act, for which urgent necessity can be alleged, which he is not entitled to perform, the Court will not confer special powers on him acting alone or with curators;[10] and no such powers would prevent a reduction.[11]

SUBSECTION (3).—*Acts not competent to a Minor even with Consent of Curators.*

69. While a minor may alienate heritage *inter vivos* for onerous causes, he cannot, even with consent, alter the succession to his heritable estate by any gratuitous deed *inter vivos* or *mortis causa*.[12] No such consent can render valid a gratuitous alteration of the settlement of his estate,[13] or a disposition of heritage *mortis causa*.[14] As before stated, the rule does not apply to subjects heritable *destinatione* merely,[15] nor to the proceeds of heritage sold by a factor *loco tutoris* under special powers.[16] The rule does not apply to changes of property from moveable to heritable effected by a tutor or curator.[1] It has been held that a minor cannot, even with the consent of his curators, validly discharge debts gratuitously or make donations.[2]

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[1] *Yorkston* v. *Burn*, 1697, Mor. 8950; *M'Culloch* v. *M'Culloch*, 1731, Mor. 8965; *Waddel* v. *Waddel*, 1739, Mor. 8965.

[2] *Bruce* v. *Hamilton*, 1854, 17 D. 265; see *Stevenson* v. *Adair*, 1872, 10 M. 919; *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473; *Jack* v. *Boyd*, 1899, 7 S.L.T. 164.

[3] *Borthwick* v. *Young*, 1681, Mor. 12433.

[4] *Wilkie* v. *William Dunlop & Co.*, 1834, 12 S. 506; *M'Michael* v. *Barbour*, 1840, 3 D. 279.

[5] *Harvie* v. *M'Intyre*, 1829, 7 S. 561.

[6] *Stuart* v. *Stuart*, 1639, Mor. 8943; *Inglis* v. *Sharp's Exrs.*, 1631, Mor. 8941; *Scoffier* v. *Read*, 1783, Mor. 8936.

[7] *M'Adam* v. *Laird of Lag*, 1605, Mor. 8939; *Corser* v. *Deans*, 1672, Mor. 8944; *Drummond* v. *Baron Broughton*, 1627, Mor. 8939; *Brown* v. *Nicolson*, 1629, Mor. 8940.

[8] *Stark* v. *Tennant*, 1846, 8 D. 1001.

[9] *Brown* v. *Nicolson*, 1629, Mor. 8940.

[10] Bell's Prin., s. 2096; *Wallace* v. *Wallace*, 8th March 1817, F.C.

[11] Ersk. i. 7, 17 (Ivory's Note); *Vere* v. *Dale*, 29th February 1804, F.C.

[12] Ersk. i. 7, 33.

[13] *Marquis of Clydesdale* v. *Earl of Dundonald*, 1726, Mor. 8964, 1265; 1726, Robert. 564.

[14] *Cunynnghame* v. *Whitefoord*, 1797, Mor. 8966; *Hunter*, 1728, Mor. 8964.

[15] *Brand's Trs.* v. *Brand's Trs.*, 1874, 2 R. 258 (271).

[16] *Brown's Tr.* v. *Brown*, 1897, 24 R. 962.

SECTION 4.—PUPILS.

SUBSECTION (1).—*General Law.*

70. A pupil has no person, in the legal sense of the word, therefore *tutor datur personæ*,[3] and acts for him.[4] "He is incapable of acting or even of consenting . . . hence a pupil cannot subscribe with his tutor." [3] He cannot enter into contracts, or grant obligations on which diligence will follow; [5] and of course cannot marry [6] or make a will.[7] Exceptions to the rule are contracts judged beneficial to the pupil, which the other party is held bound to perform; [3] and where necessaries are sold and delivered to "an infant, or minor," a reasonable price must be paid therefor.[8] To sum up this general statement of the law—in the words of Mr. Bell—"No act done by the pupil, or action raised in his name, has any effect without the interposition of a guardian"—either the father as administrator-in-law, the mother under the Guardianship of Infants Acts, 1886 and 1925,[9] or a tutor.[10]

71. Where any deed, therefore, is granted dealing with the pupil's affairs, it is executed by the guardian in his own name, without the pupil appearing even as a consenter,[11] "for subscription imports consent, of which a pupil is presumed incapable." [3] On the other hand, where no act is performed, and where it is only necessary to remain passive—as when a deed is granted in the pupil's favour, or title made up in his name—the pupil is then treated as if *sui juris*, and the deed is taken directly to him alone without mentioning the tutor.[12] Power, however, is given by statute to a factor *loco tutoris* to complete title to heritage either in his own name or in that of the pupil, by means of a petition to the Court.[13] It is usual for the factor to take the title in his own name where he means to apply to the Court for special power to sell.[14]

72. The rules in regard to privileges and disabilities in the case of minors apply *a fortiori* to those in pupillarity. While, therefore, the deeds of a pupil are *ipso jure* null, those granted by a father or tutor may be reduced within the *quadriennium utile* on the ground of minority and lesion.[15]

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[1] Ersk. i. 7, 18.

[2] *Saltcoats* v. *The Justice-Clerk*, 1623, Mor. 8958; *Lockhart* v. *Lockhart*, 1626, Mor. 8958; *M'Culloch* v. *M'Culloch*, 1731, Mor. 8965.

[3] Ersk. i. 7, 14.

[4] *Dalgleish* v. *Hamilton*, 1752, Mor. 2184.

[5] Fraser, P. & C., p. 205.

[6] *Johnston* v. *Ferrier*, 1770, Mor. 8931.

[7] M'Laren, Wills, i. 261.

[8] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

[9] 49 & 50 Vict. c. 27; 15 & 16 Geo. V. c. 45.

[10] Bell's Prin., s. 2067.

[11] *Stevenson's Trs.* v. *Dumbreck*, 1857, 19 D. 462, per Lord Curriehill at p. 472; Fraser, P. & C., p. 205.

[12] Fraser, P. & C., p. 205; *Lady Kennedy* v. *Innes*, 1823, 2 S. 375; Juridical Styles, "Disposition," i. 106.

[13] 31 & 32 Vict. c. 101, s. 24, as amended by 32 & 33 Vict. c. 116, s. 3.

[14] See JUDICIAL FACTOR, Vol. VIII. p. 479, *ante*.

[15] Ersk. i. 7, 34; Fraser, P. & C., p. 499.

SUBSECTION (2).—*Particular Relations.*

(i) *As Litigants.*

73. The position of pupils in regard to litigation has been discussed elsewhere.[1] The practice of the Court in regard to the appointment of curators *ad litem* to pupils who have no guardians has recently been the subject of consideration, and it is now settled that it is competent to appoint a curator *ad litem* even when the pupil has not appeared in the process, though in such a case the curator's first duty will be to consider whether or not appearance should be entered.[2]

(ii) *As Witnesses.*

74. Pupils are eligible as witnesses[3] if they have intelligence sufficient to comprehend the subject of inquiry and the obligation to tell the truth; as to which the judge ought to satisfy himself by the manner of the child, and even by the examination of third parties.[4] A youthful witness is accepted more readily in criminal than in civil cases.[5] The amount of weight to be allowed to the testimony of a pupil is a matter for the judge or jury, having regard to the intelligence and manner of the witness and the nature of the facts in question. The age at the examination, rather than at the date of the facts, is to be considered, unless the child was very young, and there had been a long interval.[6] Children under the age of twelve are not sworn, but are admonished to tell the truth; above the age of twelve they may be sworn in the discretion of the judge; above the age of fourteen they may be sworn without inquiry.[7] A pupil cannot validly witness a formal written deed or instrument;[8] and a reference to the oath of a pupil is incompetent.[9]

(iii) *In Relation to Crime and Negligence.*

75. Pupils above the age of seven are liable to be prosecuted and punished for crime.[10] In civil cases they have been held capable, in certain circumstances, of contributory negligence. The age at which a child shall be held capable depends entirely on the facts of each case, the nature of the risk, etc.; it has been laid down that the question whether the pupil had sufficient capacity to be guilty of contributory negligence was a question of fact which had been properly left to the jury.[1] While the general principle is clear, it has been stated judicially that the whole question of the pupil's capability of seeing danger is in an unsettled condition.[2]

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[1] See ACTION, Vol. I. p. 61, *ante*.

[2] *Drummond's Trs.* v. *Peel's Trs.*, 1929 S.C. 484.

[3] See EVIDENCE, Vol. VI. p. 415, *ante*.

[4] Dickson on Evidence, ss. 1544–1548; Hume, ii. 341; Macdonald, 4th ed., p. 494.

[5] Cp. *Robertson* v. *Robertson*, 1888, 15 R. 1001; *Robertson* v. *Stewart*, 1898, 5 S.L.T. 414; *H.M. Advocate* v. *Millar*, 1870, 1 Coup. 430; and cases referred to in Macdonald, 4th ed., p. 495.

[6] Dickson on Evidence, s. 1547; Hume, ii. 342; Macdonald, 4th ed., p. 495.

[7] Dickson on Evidence, s. 1549; Hume, ii. 341; but see *Anderson* v. *M'Farlane*, 1899, 1 F. (J.) 36.

[8] Ersk. iv. 2, 27; *Davidson* v. *Charteris*, 1738, Mor. 16899.

[9] Dickson on Evidence, s. 1407; *Gordon's Tutors*, 1707, Mor. 8909.

[10] See CRIME, Vol. V. p. 56, *ante*.

Section 5.—Restitution on Ground of Lesion.

Subsection (1).—*Who Entitled.*

76. Minors are entitled to certain privileges on account of their youth and partial capacity. One of the most important is their right to be restored within the *quadriennium utile* against deeds granted during minority to their great lesion, though no force, fear, or error exist. The remedy is only necessary in regard to deeds that are valid till reduced, and, accordingly, deeds which are *ipso jure* null, such as those of a pupil, or of a minor without consent of his curators, do not need the aid of this rule of law, and nullity may be pleaded by exception.[3] The privilege of reducing deeds to his prejudice is allowed solely on the ground of minority,[4] so that ability, education, position of the minor, are of no account.[5] When the other conditions exist, the privilege is accorded against deeds (*a*) by a tutor,[6] (*b*) by a minor alone,[7] (*c*) by a minor with consent of curators [8] or of father,[9] and (*d*) by a minor wife with husband's consent.[10] These are all reducible on proof of lesion. Where the minor is joint owner of property sold and seeks to reduce, the reduction will be complete unless the purchaser is willing to be joint owner with the minor.[11] The heirs of the minor who is lesed are entitled to exercise the privilege,[12] and so also are the minor's creditors or assignees, voluntary and legal.[13]

Subsection (2).—*Within what Period Competent.*

77. Restitution must be claimed within the *quadriennium utile* or *annos utiles*, *i.e.* within four years after majority is attained; otherwise the minor loses his right to challenge.[14] The question has been raised whether the claim may be made prior to the *quadriennium*.[15] If, however, the minor is *non valens agere* during the *quadriennium* the rule does not apply, *e.g.* where a minor wife granted a deed in her husband's favour; in such a case it would appear that the minor was allowed a reasonable time after the dissolution of the marriage.[1] The limitation of time does not apply to deeds *ipso jure* null, *e.g.* deeds by a pupil,[2] by a minor without consent of his curators,[3] by a minor in favour of curators without value;[4] or to a decree by an incompetent Court;[5] or where the guardian has been guilty of fraud.[6] In this last case the Court held that, as there was evidence *in gremio* of fraud, a posterior ratification could not set up the deed. If the minor omits to challenge within the *annos utiles*, he cannot have recourse against his tutors and curators.[7]

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[1] *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149.

[2] *Gibson* v. *Glasgow Police Commrs.*, 1893, 20 R. 466, per Lord Trayner at p. 470; see Negligence. See also *Cass* v. *Edinburgh and District Tramways Co.*, 1909 S.C. 1068.

[3] Mackay, Practice, ii. 127.

[4] Ersk. i. 7, 36.

[5] *Dundas* v. *Allan*, 1711, Mor. 9034; *Corser* v. *Deans*, 1672, Mor. 8944.

[6] Ersk. i. 7, 34.

[7] *Morison* v. *Viscount Arbuthnot*, 1728, 1 Pat. 7; *Thomson* v. *Pagan*, 1781, Mor. 8985.

[8] Ersk. i. 7, 34; *Munro* v. *Munro*, 1735, Elchies, "Minor," No. 1; *Lord Blantyre* v. *Walkinshaw*, 1667, Mor. 8991; *Harkness* v. *Graham*, 1833, 11 S. 760.

[9] *Rose* v. *Rose*, 1821, 1 S. 154.

[10] *Hamilton* v. *Boswell*, 1720, Robert. 346; *Gibson* v. *Scoon*, 6th June 1809, F.C.

[11] Bankt. i. 7, 99.

[12] Stair, i. 6, 44; Ersk, i. 7, 42; *Hamilton* v. *Sharp*, 1630, Mor. 8981; *Forbes* v. *Earl Marshall*, 1669, Mor. 10323.

[13] Stair, *supra*; *Lord Bargenie* v. *His Sons*, 1627, Mor. 10418; *Hamilton* v. *Sharp*, 1630, Mor. 8981, 10419; *Harkness* v. *Graham*, 1833, 11 S. 760; Bell, Com. i. 135.

[14] Ersk. i. 7, 35.

[15] *Patrick* v. *William Baird & Co.*, 1927 S.N. 32.

78. Where reduction is sought by the successor of the minor lesed, the rules, based on the Roman law, seem to be as follows: (*a*) Where a minor succeeds a minor, he is entitled to the whole period yet to run of his own minority and the *quadriennium*;[8] (*b*) where a minor succeeds a major (under twenty-five years of age), he is allowed his own minority, and the unexpired period of his predecessor's *quadriennium*;[8] (*c*) where a major succeeds a minor, he is allowed four years;[8] (*d*) where a major succeeds a major, the successor (even when younger than the predecessor) is only entitled to the unexpired period of the predecessor's *quadriennium*.[9]

SUBSECTION (3).—*How Effected.*

79. Revocation by the minor is not effectual to operate restitution,[10] nor was a plea of nullity by way of exception apparently enough in the ordinary case; the deed had to be set aside by an action of reduction raised in the Court of Session during the *quadriennium utile* by the minor or those entitled; this "is the only thing that the law recognises as sufficient to restore him."[11] But now it would appear that the plea may be stated and maintained by way of exception, unless the Court considers that the matter would be more conveniently tried in a separate action of reduction.[12] The privilege is preserved for seven years by service of the summons,[13] and after the action has become a pending process it subsists for forty years.[14] It has been held unnecessary to call tutors and curators as defenders.[15]

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[1] *Lord Gray* v. *Stewart*, 1714, Mor. 6059; see *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473.

[2] Ersk. i. 7, 34; *Bruce*, 1577, Mor. 8979.

[3] *Kincaid*, 1561, Mor. 8979; *Bell* v. *Southerland*, 1728, Mor. 8985.

[4] *Manuel* v. *Manuel*, 1853, 15 D. 284; *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605.

[5] *Rankine* v. *Rankine*, 1821, 1 S. 43.

[6] *Leiper* v. *Cochran*, 1822, 1 S. 552.

[7] *Cunningham*, 1727, Mor. 16338; More's Notes, xlv.

[8] Ersk. i. 7, 42.

[9] Ersk., *supra*; *Ballantyne* v. *King*, 1628, 1 Bro. Supp. 254.

[10] *Murray* v. *Cochran*, 1630, Mor. 9041.

[11] *Stewart* v. *Snodgrass*, 1860, 23 D. 187, at p. 189; Ersk. i. 7, 34.

[12] C.A.S., C, iv. 4 (*d*).

[13] 1669, c. 10; *Earl of Forfar* v. *Marquis of Douglas*, 1699, Mor. 11324.

[14] Bankt. i. 7, 75; Fraser, P. & C., p. 537; but see 14 & 15 Geo. V. c. 27, ss. 16, 17.

[15] *Vernock* v. *Hamilton*, 1637, Mor. 2214; *Lord Blantyre* v. *Walkinshaw*, 1667, Mor. 2215.

SUBSECTION (4).—*Lesion.*

80. The lesion, to justify reduction, must be considerable or enorm;[1] but less will be enough where the transaction relates to land, or where ready money is handed over, or where there are no curators, than where curators have consented, or where judicial sanction has been given; and all the relevant circumstances will in each case be carefully considered. The date of the transaction, and not of the reduction, is the time at which to estimate the lesion.[2] As a general rule, every kind of deed by which the minor is lesed may be set aside, *e.g.* "donations, sales, pledges, discharging an action, compromises, novations and discharges of debt . . . undue renunciations of profitable successions . . . contracts of all kinds, entering upon a burdened succession, and *quasi*-delicts." [3]

81. In the case of certain deeds lesion is presumed. The presumption being against the party founding on them, he must shew that they are to the minor's advantage. Examples of such are: (*a*) Donations which are considerable in amount.[4] Here the presumption is so strong that it cannot be redargued, and restitution will at once be granted.[5] The donation may be indirect, as an acknowledgment of money not received, or discharge of debt not paid.[6] (*b*) Cautionary obligations are in the same position as donations.[7] In one case the attestor was held liable, though the minor cautioner was freed.[8] (*c*) Money borrowed by tutors or minors, even with consent of curators, must be proved to have been expended beneficially for the minor, and not squandered, in order to prevent reduction of the deed granted for the loan, or to justify a demand for payment.[9] The creditor, however, is entitled to look after the expenditure, and to demand evidence that the money is being applied *in rem versum*, or repayment of the loan.[10] (*d*) In sales of the minor's heritage,[11] and assignations of personal rights,[12] lesion is presumed, and the purchaser must shew application *in rem versum* of the price. Restitution may be granted although the sale has had the sanction of the Court.[13]

82. In many cases this presumption does not exist, and the onus is on the minor to prove lesion at the date of granting the deed. (*a*) Marriage contracts securing exorbitant provisions to the prejudice of one of the parties—a minor—may be reduced on the minor proving enorm lesion.[1] A provision, however, to one of the parties may be held good, while the contract is reduced in regard to those in favour of third parties.[2] The law only recognises considerable positive loss, and not that of a contingent opportunity of gain, as a ground of reduction; and the date of the marriage is the date when lesion must be established.[3] The rule is for the Court to restrict the provision, not to annul the contract.[4] The wife, however, could not be restored against the legal effect of marriage on her moveable property.[5] (*b*) Leases by the minor and his curators, to his lesion, may be set aside.[6] (*c*) Payment of a debt, which could not be the foundation of an action at law, may be redemanded on lesion,[7] and a bond granted for a debt will be reduced if the minor might have proponed a sound defence.[8] It is doubtful if this applies to a prescribed account.[9] (*d*) In judicial proceedings, where a correct defence in fact [10] or law [11] or a good ground of action is omitted to be stated, the minor may be restored against a decree *in foro* on the ground of "competent and omitted." But the process must be by or against the minor, not third parties,[12] and it has been stated that the minor is only restored against the findings by which he is lesed.[13] It has been held that though a reference to the adversary's oath was erroneously made, the minor will not be allowed to open up the decree following it.[14] But this plea of "competent and omitted" will not be allowed to found a reduction if the long lapse of years has clearly prejudiced the creditor's power to lead evidence.[15] Again, the minor will not, on the ground of minority and lesion, be reponed against a decree for default to obtemper the orders of Court, or through allowing the reclaiming days to expire.[16] The minor's power to reduce a decree by an incompetent tribunal is not, of course, limited to the *quadriennium utile*.[17] (*e*) Where the lesion is flagrant, restitution will be granted against submissions by tutors or minors or curators, if the subject was not a fit one to refer, if the arbiters were unfit, or if the reference has been unskilfully conducted.[1] (*f*) It has been stated that a minor will be restored against all omissions which have prevented him acquiring an advantage;[2] but this will not apply to the omission to obtain relief from a cautionary obligation undertaken by the minor's father, where the lesion arose indirectly from the unexpected bankruptcy of the principal;[3] and other exceptions to the rule will depend on the circumstances of the case and the interest of third parties who have intervened. (*g*) Agreements under the Workmen's Compensation Acts may be reduced on proof of lesion, but in the cases which have occurred the reduction has failed, through failure to establish lesion at the date of the transaction.[4] (*h*) When a minor, who took up, whether directly or indirectly,[5] the succession of an ancestor burdened beyond its value, was willing to renounce all benefit from the succession, the Court restored him against liability for debts incurred by his representation.[6] Where, however, the lesion arose indirectly through the mismanagement or squandering of the tutor or curator or minor, restitution was barred;[7] and bills and bonds granted in fulfilment of an express undertaking to pay ancestor's debts had to be met, unless the original obligation to pay debts was reduced.[8] A minor may still become liable as vitious intromitter for all his ancestor's debts unless he obtains relief within the *annos utiles*.[9] Since the Conveyancing (Scotland) Act, 1874, a minor heir is only liable to the extent of the heritable estate or his intromissions.[10] A minor may retract his acceptance of a legacy imposing heavy liabilities or attended with a disadvantageous condition, and may also retract his renunciation of a lucrative inheritance or legacy.[11] Where the minor is lesed by something happening subsequent to his taking up the succession, such as fire, or by loss of the succession after payment of creditors, he cannot be restored.[12]

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[1] Ersk. i. 7, 36; Stair, i. 6, 44.

[2] See *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473; 15 R. (H.L.) 21.

[3] Fraser, P. & C., p. 504.

[4] *Heriot* v. *Blyth*, 1681, Mor. 8925.

[5] Bell's Prin., s. 2100.

[6] *Lockhart* v. *Lockhart*, 1626, Mor. 8958; *Moncrief* v. *Mitchell's Crs.*, 1729, Mor. 8996; *Viscount of Arbuthnot* v. *Morison*, 1716, Mor. 9487; 1728, 1 Pat. 7.

[7] *Wall* v. *Brownlee*, 1724, Mor. 9035; *Sutherland* v. *Morson*, 1825, 3 S. 449.

[8] *Earl of Kinghorn* v. *Cleland*, 1672, Mor. 2075.

[9] Stair, i. 6, 44; Ersk. i. 7, 37; Bell's Prin., s. 2100; Bell, Com. i. 135; *Lord Blantyre* v. *Walkinshaw*, 1667, Mor. 8991; *Scoffier* v. *Read*, 1783, Mor. 8936; *Harkness* v. *Graham*, 1833, 11 S. 760.

[10] *Ferguson* v. *Yuill*, 1835, 13 S. 886.

[11] *Thomson* v. *Stevenson*, 1666, Mor. 8991; *Harkness* v. *Graham*, *supra*, per Lord Balgray.

[12] *Houston* v. *Maxwell*, 1631, Mor. 8986; *Ruthven* v. *Gray*, 1672, Mor. 31.

[13] Stair, i. 6, 18; *Vere* v. *Dale*, 1804, Mor. 16389; *Auld*, 1856, 18 D. 487, per Lord Pres. M'Neill.

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[1] Stair, i. 6, 44; Ersk. i. 7, 38; Bell, Com. i. 636; *Bruce* v. *Hamilton*, 1854, 17 D. 265; *Viscount of Arbuthnot* v. *Morison*, 1716, Mor. 9487; 1728, 1 Pat. 7; *Boswal* v. *Boswal*, 1701, 4 Bro. Supp. 513; 1720, Robert. 346.

[2] *Davidson* v. *Hamilton*, 1632, Mor. 8988.

[3] *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473; reversed on another ground, 1888, 15 R. (H.L.) 21; see also *M'Gill* v. *Ruthven*, 1664, Mor. 5696; *Jack* v. *Boyd*, 1899, 7 S.L.T. 164; Fraser, P. & C., p. 509, n. 3, as to what constitutes the necessary lesion.

[4] Stair, i. 6, 44; *M'Gill*, *supra*.

[5] *Anderson* v. *Abercrombie's Trs.*, 1824, 2 S. 662; *Byres* v. *Reid*, 1708, Mor. 8995.

[6] *Munro* v. *Munro*, 1735, Elchies, "Minor," No. 1; *Gibson* v. *Scoon*, 6th June 1809, F.C.

[7] Ersk. i. 7, 38; iii. 1, 4.

[8] *Watson* v. *Davidson*, 1738, 5 Bro. Supp. 167.

[9] Bankt. i. 7, 87.

[10] Ersk. i. 7, 38; *Stuart* v. *Stuart*, 1638, Mor. 9008; *Alexander* v. *Park*, 1697, Mor. 9016; *Gordon* v. *Earl of Queensberry*, 1680, Mor. 8235.

[11] *Seattoun* v. *Thorntoun*, 1665, 1 Bro. Supp. 511; *Countess of Kincardine* v. *Purves*, 1698, Mor. 9016.

[12] *Anderson* v. *Geddes*, 1732, Mor. 9020.

[13] Bankt. i. 7, 89.

[14] *Cubie* v. *Cubies*, 1699, Mor. 9017.

[15] *Oakley* v. *Telfer*, 1705, Mor. 9019; see *Shedden* v. *Patrick*, 1852, 14 D. 721 (735); 1854, 1 Macq. 535.

[16] *Paip* v. *Newton*, 1683, Mor. 9012; *Badenoch* v. *Kelman*, 1769, Hailes, 276.

[17] *Rankine* v. *Rankine*, 1821, 1 S. 43.

SUBSECTION (5).—*Where Restitution Barred.*

83. The minor will not be restored where the contract has been beneficial to him, or the money which he has paid away has been applied *in rem versum* of himself.[13] Where the father is not primarily liable under his obligation to aliment, the rule seems to be to uphold the contract for so much of the goods supplied as are suitable or necessary to the minor's condition, or really applied to his use.[1] For alimentary debts the father is the proper debtor where the minor is without funds.[2] The defence of *in rem versum* is good even when money is borrowed by the minor or his curators, if it be applied in payment of debts, purchase of property, or improvement of the estate.[3] The defence also applies to transactions even between the minor and his guardian, though of such the law is jealous.[4]

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[1] Bankt. i. 7, 93; *Williamson* v. *Fraser*, 1739, Mor. 8965; Bell, Arbitration, p. 103; cp. More's Notes, xlvi.

[2] Fraser, P. & C., p. 515; but see *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473.

[3] *Erskine* v. *Erskine*, 1739, Mor. 9002.

[4] *Robertson* v. *S. Henderson & Sons*, 1905, 7 F. 776; *Boath* v. *Lowson, Ltd.* (O.H.), 1924, S.L.T. 138; *Patrick* v. *William Baird & Co.*, 1927 S.N. 32.

[5] *Taylors in Leith* v. *Dennistones*, 1687, Mor. 9001; *Tailzifer* v. *Drummond*, 1631, Mor. 9000; *Murray* v. *Chalmers*, 1705, Mor. 9001; *M'Dougal* v. *Kennedy*, 1628, Mor. 8999.

[6] Ersk. i. 7, 38; *Earl of Aberdeen* v. *Gordon*, 1708, Mor. 9031.

[7] *Matheson* v. *Matheson*, 1631, 1 Bro. Supp. 186; *Taylors in Leith* v. *Dennistones*, *supra*.

[8] *Henderson* v. *Dryburgh*, 1684, Mor. 8992; see *Henry* v. *Scott*, 1892, 19 R. 545.

[9] *Kerr* v. *Bremner*, 1839, 1 D. 618; 1842, 1 Bell's App. 280.

[10] 37 & 38 Vict. c. 94, s. 12.

[11] Fraser, P. & C., p. 508.

[12] Bankt. i. 7. 77; Ersk. i. 7. 36; *Edgar* v. *Edgar's Exrs.*, 1614, Mor. 8986.

[13] *Ruthven* v. *Gray*, 1672, Mor. 31; *Dempster* v. *Potts*, 1836, 15 S. 364; *Harper* v. *Hamilton*, 1687, Mor. 8927; *Scoffier* v. *Read*, 1783, Mor. 8936.

84. Deeds such as bills and bonds granted by a minor who is engaged in trade, profession, or business, within the line of that business, are unchallengeable on the ground of lesion; [5] and the presumption is that the deed was granted for business purposes.[6] Even when the minor borrows money the presumption of lesion is reversed.[7] The leading rule has been applied to the acts of a minor engaged as factor or agent,[8] and as sheriff-clerk substitute.[9] A minor, however, who, speculated to his loss in railway shares with other parties who were aware of his position, was held not barred by his contract; and it was stated that the defence that he was engaged in trade was not maintainable.[10]

85. Fraud or fault on the part of the minor, either leading to the contract or after it has been entered into, is usually a good answer to the action for restitution; [11] for example, where he pretends that he is of age,[12] or fraudulently fails to state that he is a minor when he appears to have attained majority.[13] If, however, the minor states, and believes, that he is major without intent to deceive, he is entitled to be restored on the ground of lesion.[14] If, again, his appearance indicates minority, his affirmation of majority is said not to bar restitution,[15] as the other party ought to use due diligence; and it is *a fortiori* of this rule where the contracting party was aware of the disability.[16] It has been laid down that the proof of the minor's fraudulently inducing the other party to contract must be by writ or oath.[17]

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[1] Stair, i. 6, 44; *Johnston* v. *Maitland*, 1782, Mor. 9036; *Gray* v. *Purves*, 1816, Hume 411; *Fontaine* v. *Foster*, 1808, Hume, 409.

[2] Ersk. i. 6, 57; *Hamilton* v. *Forrester*, 1825, 3 S. 572; *Telfer* v. *Maxwell*, 1758, Mor. 9625; *Wallace* v. *Crawford*, 1672, Mor. 13425.

[3] *Earl of Morton* v. *Muirhead*, 1749, Mor. 8931; see *Dempster* v. *Potts*, 1836, 15 S. 364; *Stark* v. *Tennant*, 1843, 5 D. 542.

[4] *Corser* v. *Deans*, 1672, Mor. 8944; see also *Anderson* v. *Anderson*, 1832, 11 S. 10.

[5] Stair, i. 6, 44; Ersk. i. 7, 38; *Craig* v. *Grant*, 1732, Mor. 8955; *Galbraith* v. *Lesly*, 1676, Mor. 9027; *Blythman* v. *Murray*, 1649, 1 Bro. Supp. 405; see *M'Michael* v. *Barbour*, 1840, 3 D. 279.

[6] *Craig, supra*; *Campbell* v. *Turner*, 1822, 1 S. 266.

[7] *Macdonald*, 1789, Mor. 9038.

[8] *Grieve* v. *Tait*, 1732, Mor. 9036.

[9] *Heddell* v. *Duncan*, 5th June 1810, F.C.

[10] *Dennistoun* v. *Mudie*, 1850, 12 D. 613 (see Lord Ivory's opinion).

[11] Stair, i. 6, 44; Ersk. i. 7, 36; see *Harvie* v. *M'Intyre*, 1829, 7 S. 561; *M'Michael* v. *Barbour*, 1840, 3 D. 279 (282); *Cranstoune* v. *Dowglas*, 1649, 1 Bro. Supp. 422.

[12] *Wemyss* v. *Wemyss' Crs.*, 1637, Mor. 9025; *Borthwick* v. *Young*, 1681, Mor. 12433.

[13] *Wilkie* v. *Wm. Dunlop & Co.*, 1834, 12 S. 506; *M'Dougall* v. *Marshall*, 1705, Mor. 8995.

[14] *Sutherland* v. *Morson*, 1825, 3 S. 449; *Bell* v. *Wilson*, 1639, Mor. 8943.

[15] Stair, i. 6, 44; Ersk. i. 7, 36.

[16] *Kennedy* v. *Weir*, 1665, Mor. 11658.

[17] *Wemyss* v. *Wemyss' Crs.*, 1637, Mor. 9025; but see Bankt. i. 7, 81.

86. Unless there is fraud on the part of the debtor, (*a*) the payment to the minor, or the minor and his curators, of ordinary personal debts, rents, interests, dividends, and (*b*) deeds which the party is compelled to grant, are usually safe from challenge.[1] But lesion will be presumed in all cases where, there being curators, payment is made without their knowledge and concurrence.[2] Where, again, a minor, to his lesion, agrees to a discharge by novation or delegation, or accepts a personal obligation in room of a heritable security, he will be restored.[3] While a debtor may safely pay a heritable debt called up and discharged by a minor and his curators, it is, as we have seen, doubtful whether a discharge by a minor who has no curators is safe from challenge.

87. There is no restitution where the injury is the result of some transaction between third parties to which the minor is not a party,[4] or is a *damnum fatale*.[5]

88. Formerly a minor was barred from claiming restitution if he had given his oath not to challenge, but by statute [6] it was declared unlawful to exact such oaths during minority. After majority, however, the party may ratify so as to bar challenge, even against his tutors and curators.[7] The ratification may be by express deed, or the homologation may be implied from facts and circumstances.[8] In each case the question depends on the special facts. Payment of interest,[9] receipt of rent,[10] assignation of a subject purchased,[11] payment of the whole or part of a bond, receipt of part of the price, or completion of an inchoate transaction, will bar the right to be restored; but ratification obtained by unfair means or influence will not be effectual.[12] It was held not to bar challenge that the minor had recognised a deed in her marriage contract.[13] There can be no ratification after challenge by the minor's creditors.[14]

SUBSECTION (6).—*Against whom Obtained.*

89. Redress may always be had against a person of full age who has transacted with the minor and guardians. Where, however, rights have subsequently been acquired by third parties, the remedy to be given will depend on the circumstances of the case. Where the right has been assigned gratuitously to third parties, the minor's rights against them are said to be the same as against the original creditor.[15] In onerous transactions regarding real rights the singular successor is safe in trusting to the records, unless the matter was litigious before he acquired his right, or unless he knew that the original transaction had been with a minor, or saw the fact stated in the titles.[1] In the case of personal rights, restitution will be granted against the general creditors of one contracting with the minor,[2] but Erskine's doctrine that the minor may be restored against all such transactions[3] has been doubted.[4]

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[1] Ersk. i. 7, 36; *Taylors in Leith* v. *Dennistones*, 1687, Mor. 9001.

[2] Ersk. i. 7, 37.

[3] *Moncrief* v. *Mitchell's Crs.*, 1729, Mor. 8996.

[4] *Anderson* v. *Geddes*, 1732, Mor. 9020; *Lady Carnegie* v. *Lord Cranburn*, 1663, Mor. 8991.

[5] *Edgar* v. *Edgar's Exrs.*, 1614, Mor. 8986; Ersk. i. 7, 36; Bell, Com. i. 136; More's Notes, xlvi.

[6] 1681, c. 19.

[7] Stair, i. 6, 44; Bell, Com. i. 135; *Roberton* v. *Roberton*, 1831, 9 S. 865; *Earl of Southesk* v. *Philiphaugh*, 1670, 1 Bro. Supp. 603.

[8] *Lord Advocate* v. *Wemyss*, 1899, 2 F. (H.L.) 1; see *Henry* v. *Scott*, 1892, 19 R. 545.

[9] *Johnston* v. *Hope*, 1630, Mor. 9041; Ersk. i. 7, 39.

[10] *Gordon* v. *Hall*, 1757, Mor. 15178.

[11] *Marquis of Montrose* v. *Livingston*, 1697, Mor. 9046.

[12] *Melvil* v. *Arnot*, 1782, Mor. 8998; *Leiper* v. *Cochran*, 1822, 1 S. 552.

[13] *Rose* v. *Rose*, 1821, 1 S. 154.

[14] *Harkness* v. *Graham*, 1833, 11 S. 760.

[15] Ersk. i. 7, 40.

90. Where a minor contracts with a minor, the party lesed is entitled to redress if the other cheated him, or is a gainer by the transaction.[3] Where, again, there is no fraud, and both minors are lesed, the *status quo* is maintained, and the minor who is under obligation to perform or give anything, in return for some consideration already received, is relieved.[5]

SUBSECTION (7).—*Effect of Restitution.*

91. The decree of reduction sets aside the objectionable deed *ab initio*, and not only from the date of litiscontestation; [6] and in real rights there is no need that the minor be again infeft.[7] The restitution is, as far as possible, to be mutual.[8] In the case of a sale of land, the price and interest, or so much as has been applied *in rem versum*, must be restored, and any real improvement on the property paid for—while the property itself must be returned as it came from the minor.[9] As before stated, the minor, although bound in any case to pay for real improvements, is not bound to restore the price, or any part of it, which has been unprofitably squandered.[10] In regard to borrowed money also, as we have seen, the minor is only liable for what has been applied *in rem versum*.[11] Where, however, the contract is not voluntary on the part of the other, restitution must be in all respects equal, and the defence that the money has been recklessly squandered is not effectual; [12] though deductions for payment of just debts due by an ancestor whose succession the minor had taken up,[13] and, perhaps, for fruits *bona fide* consumed, will be sustained.[14]

SECTION 6.—PRIVILEGES WITH REGARD TO PRESCRIPTION.

92. Certain of the prescriptions and limitations do not run against minors, but are suspended during minority. The years that have run before the suspension will be added to those after majority has been attained, in order to make up the full period.[1] To enable the minor to claim the privilege, he must have been entitled to make the demand, and accordingly the years of minority of substitute heirs of entail are not deducted;[2] and the minority of one of the nearest of kin only affects that part of a debt which would have come to him in the distribution of the estate.[3] The privilege may be pleaded even by a minor engaged in trade.[4]

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[1] Ersk. i. 7, 40; Bankt. i. 7, 95; *Campbell* v. *Graham's Reps.*, 1752, Mor. 9021; *Gourlie* v. *Gourlie*, 1728, Mor. 10288.

[2] *Moncrief* v. *Mitchell's Crs.*, 1729, Mor. 8996.

[3] Ersk. i. 7, 40.

[4] Fraser, P. & C., p. 538; see *Anderson* v. *Spence*, 1683, Mor. 10286; *Craick* v. *Maxwell*, 1682, Mor. 9029.

[5] Ersk. i. 7, 40; Bankt. i. 7, 92.

[6] *Houston* v. *Maxwell*, 1631, Mor. 8986.

[7] Steuart's Answers to Dirleton, p. 238.

[8] Ersk. i. 7, 41; Bell, Com. i. 136.

[9] Ersk. i. 7, 41; Bell, Com. i. 136; *M'William* v. *Shaw*, 1576, Mor. 9022.

[10] *Thomson* v. *Stevenson*, 1666, Mor. 8983 (Dirleton's Report).

[11] Ersk. i. 7, 37 and 41; *Lord Blantyre* v. *Walkinshaw*, 1667, Mor. 8991; *Harkness* v. *Graham*, 1833, 11 S. 760.

[12] Ersk. i. 7, 41; *Farquhar* v. *Campbell*, 1628, Mor. 9022; *Earl of Aberdeen* v. *Gordon*, 1708, Mor. 9031.

[13] *Ruthven* v. *Hope*, 1682, Mor. 9030.

[14] *Earl of Winton* v. *Countess of Winton*, 1666, Mor. 9047.

93. A list of the prescriptions, etc., which do not strike against minors will be found in Lord Fraser's work on the law relative to Parent and Child.[5] The law, as there given, has been altered, so far as the long positive and negative prescriptions are concerned, by a recent statute,[6] and minors are no longer privileged in regard to these prescriptions. Further, in the matter of appeals to the House of Lords, the additional time for appealing was first limited by Standing Orders of the House to one year after majority, and then abolished altogether.[7] It may be stated generally that the privileges which minors enjoy in regard to prescriptions are given to them by the statutes which create the prescriptions, so that if no privilege is reserved in a statute the minor is subject to the ordinary rule. Thus the septennial limitation of cautionary obligations,[8] and the triennial prescription of merchants' accounts,[9] both run against minors.

SECTION 7.—THE PRIVILEGE, MINOR NON TENETUR PLACITARE SUPER HÆREDITATE PATERNA.

94. The rule that a minor need not defend any action questioning the validity of his paternal ancestor's rights to his lands, when vested in the ancestor by sasine, brought by one claiming on a right preferable to the ancestor's,[10] is one of the most ancient in the common law of Scotland, and is now practically in desuetude.[11] This privilege did not extend, *inter alia*, to leases, or possessory actions, or actions of division, or for feu-duties or casualties, or to actions brought in the ancestor's lifetime. Nor can it be pleaded to support the fraud of the ancestor, or to oppose his obligation. As most of the cases belong to the early part of the seventeenth century, it may be enough here to refer to the detailed account of the privilege and authorities given by Lord Fraser.[12]

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[1] Ersk. iii. 7, 45; *Earl of Marchmont* v. *Home*, 1714, Mor. 11154.

[2] *Auchindachy's Crs.* v. *Grant*, 1792, Mor. 10971.

[3] *Cuming* v. *York Buildings Co.*, 1790, Mor. 11170; see also *Allan* v. *Brander*, 1839, 1 D. 678; 1842, 1 Bell's App. 167.

[4] *M'Donald*, 1789, Mor. 9038.

[5] Fraser, P. & C., pp. 543 *et seq.*

[6] 14 & 15 Geo. V. c. 27, ss. 16, 17.

[7] 39 & 40 Vict. c. 59, s. 11; Standing Orders, 1905; see Standing Orders, 1929.

[8] *Stewart* v. *Douglas*, 1712, Mor. 11151.

[9] *Brown* v. *Brodie*, 1709, Mor. 11150.

[10] Stair, i. 6, 45; Ersk. i. 7, 43.

[11] *M'Farlane* v. *Hume*, 1797, Mor. 9086.

[12] Fraser, P. & C., pp. 550 *et seq.*

SECTION 8.—PRIVILEGE OF CHOOSING CURATORS.

SUBSECTION (1).—*Occasion for Choosing.*

95. Where a father is dead and has not nominated curators to a minor in his testament, or where the curators nominated have not accepted, or, having accepted, have failed,[1] the minor, having attained puberty, has the right to choose a curator or curators.[2] The right is not excluded by the nomination of curators by any other person than the father.[3]

SUBSECTION (2).—*Form of Action.*

96. The proceedings may be raised by the minor either in the Sheriff Court, to whose jurisdiction he may be subject by residence, if his next of kin are not resident abroad, or in the Court of Session. In the latter case they begin by summons, and in the former by an edict of curatory. The conclusions of the edict or the summons are, that in terms of the Statute 1555, c. 35 (and also 1672, c. 2, if it is desired to conjoin conclusions for making up curatorial inventories, as is usually done), the person nominated and chosen by the minor should be ordained to be curator to him during the period of his minority, and that the defenders, as nearest of kin, and all others having interest, should be summoned to appear to hear and see the curator chosen by the minor, and authorised by the Court to manage the estate of the minor, with the usual powers, and (if it is desired to make up inventories) to concur with the curator in making up inventories of the minor's estate, heritable and moveable, and to subscribe three copies thereof, and to see caution received from the curator; with certification that, if they fail, such person will be decerned and authorised to be curator to the minor as shall be nominated and chosen by him, and that the Court will concur, or delegate some proper person to concur, with the curator in making up inventories.[4]

SUBSECTION (3).—*Defenders.*

97. Although the Act of 1555 required only "twa of the minor's kin" to be defenders, in practice two of the nearest of kin on the father's side, and two on the mother's side, must be cited,[5] as in the case of proceedings under the Act 1672, c. 2, for making up inventories. Where the nearest of kin are themselves to be nominated, the next after them are cited instead. Where the nearest of kin are furth of Scotland, although other kin are resident in Scotland, the usual and proper procedure is to petition a Division of the Court of Session,[6] by printed petition,[7] to dispense with citation of the nearest of kin, after which the action proceeds against the nearest of kin after them resident in Scotland.[8]

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[1] *Bruce* v. *Hamilton*, 1854, 17 D. 265, per Lord Curriehill at p. 268.

[2] 1555, c. 35.

[3] *Scot* v. *Kennedy*, 1675, Mor. 16291.

[4] Juridical Styles, 3rd ed., iii. 206.

[5] *Wallace* v. *Kennedy*, 1674, Mor. 16290.

[6] *De Maria* v. *De Maria*, 1831, 3 Sc. Jur. 536.

[7] *Duthie*, 1854, 17 D. 143; Juridical Styles, 3rd ed., iii. 777; *Lyde Malcolm*, 1919 S.C. 598.

[8] *Buchan's Tutors*, 1873, 11 M. 662; *M'Clements*, 1867, 5 M. 944.

Where the minor or his father is illegitimate, the citation of the paternal next of kin is craved to be dispensed with.[1]

SUBSECTION (4).—*Procedure.*

98. After the ordinary procedure of calling the summons, etc., the minor either personally chooses his curators, signing a minute to that effect, or, as is now the usual course, lodges a tested deed of nomination, signed by him, with a minute craving the judge to admit the nomination. If reasonable grounds be stated for suspecting that the minor's choice may be unduly influenced, he may be sequestered for some time prior to choosing.[2] It has been settled that, though the minor declares that the curators shall not be liable in omissions nor *singuli in solidum*, and gives other privileges restricting the rules of the common law, all such privileges are *ultra vires*.[3] He may, however, regulate the form of appointment by making the nomination joint, or with a *sine quo non*, or a quorum.[4] The curators may accept office (1) by appearing in Court, signing a minute of acceptance, and taking the oath; or (2) by accepting and taking the oath before the Sheriff, or any justice of the peace, to whom commission is generally granted for that purpose. The subsequent procedure deals with the finding of caution and making up of curatorial inventories.

SUBSECTION (5).—*Persons who may be Chosen.*

99. The minor may choose as curator any person (even his mother)[5] major and resident in Scotland, but not a married woman.[6] It appears to be in the discretion of the judge to sanction the nomination of a person resident furth of Scotland, if he sign an obligation binding himself to carry out the orders of the Court, finding caution, and prorogating the jurisdiction.[7] No second nomination is competent to the minor, unless the curators chosen die, or are removed, or resign with permission of the Court.[8]

SUBSECTION (6).—*Modern Alternatives.*

100. The somewhat cumbrous procedure of choosing curators is in great measure superseded in practice by the more convenient petition to the Junior Lord Ordinary for the appointment of a *curator bonis* to the minor, usually combined with a crave for a factor *loco tutoris* where the family includes both pupils and minors.[1] This course would probably be followed where there are no relatives on the father's or mother's side, or if they are out of the country, and in several other cases where necessity is the ground for the application.[2] Further, it may be noted that the Judicial Factors (Scotland) Act, 1889, provides[3] that where the estate of a pupil has, up to the date of his becoming a minor, been administered by a factor *loco tutoris*, the factor shall *ipso facto* become *curator bonis* to the minor, without any new application to the Court, and shall administer the estate until the minor shall choose curators or attain majority.[4] But the consent of the minor must be obtained before the Court can appoint a *curator bonis*;[5] and so in *Macdonald*,[6] Lord Kyllachy refused, in the face of opposition by the minors resident in America, who could choose curators if they pleased, to appoint a *curator bonis* on a petition presented by a cousin, which stated that the minors had certain interests in the residue of a trust estate about to be divided, and that there was no person in Scotland legally entitled to receive the shares of the minors, or to give a valid discharge.[7]

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[1] *Wilson*, 1859, 21 D. 736; *Kyle*, 1861, 23 D. 1104.

[2] *Wilson* v. *Campbell*, 10th March 1819, F.C.; *Grant* v. *Innes*, 1844, 7 D. 226; Fraser, P. & C., p. 466.

[3] *Watson* v. *Rae*, 1773, Mor. 16369.

[4] Fraser, P. & C., p. 463.

[5] *Johnstoun* v. *Johnstoun*, 1550, Mor. 16222.

[6] *Marquis of Montrose*, 1695, 4 Bro. Supp. 277; *Chalmers' Trs.* v. *Sinclair*, 1897, 24 R. 1047; but see Vol. VIII. p. 451, *ante*.

[7] *Lord Macdonald*, 1864, 2 M. 1194; *Fergusson* v. *Dormer*, 1870, 8 M. 426; Mackay, Practice, ii. 296, n. (*e*).

[8] *A.* v. *B.*, 1545, Mor. 16221; *Adam* v. *Fairholm*, 1627, Mor. 16247.

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[1] *Arnot, Irvine, Paterson*, 1849–50, 12 D. 912; 20 & 21 Vict. c. 56, s. 4.

[2] *Towton*, 1847, 10 D. 225; *Webster*, 1849, 12 D. 912; cp. *Macarthur*, 1854, 26 Sc. Jur. 499; *Barron*, 1854, 17 D. 61; see Fraser, P. & C., pp. 462, 571.

[3] 52 & 53 Vict. c. 39, s. 11.

[4] See *Ferguson* v. *Blair*, 1908, 16 S.L.T. 284.

[5] *Wood*, 1849, 11 D. 1494; *Accountant of Court*, 1854, 16 D. 717.

[6] 1896, 4 S.L.T. 4.

[7] See JUDICIAL FACTOR, Vol. VIII. p. 441; TUTORS AND CURATORS; Mackay, Practice, ii. 293–299; Maclaren, Practice, 758–765.

MINUTE.

See PRACTICE AND PROCEDURE.

MINUTE BOOK.

See COURT OF SESSION.

MISREPRESENTATION AND FRAUD.

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SECTION 1.—INTRODUCTORY. SCOPE AND RELATIONS OF TOPICS.

SUBSECTION (1).—*General.*

101. The body of law relating to the broad topic of the Court's interference with rights apparently established in persons (whether by virtue of contract or otherwise) by way of rectification on various equitable grounds is a very large one. Generally speaking, it is a system of equitable rectifications which proceeds from a natural justice so

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GENERAL AUTHORITIES.—Moncrieff, Fraud and Misrepresentation (last edition, 1891), is English, and conveniently treats the topics under headings of different contracts, but is out of date; Kerr, Fraud and Mistake, is up to date, but for Scottish use it is subject to the criticisms contained in the text; Spencer Bowen's Actionable Misrepresentation may well be consulted; its theoretical method is also tinged by the English conceptions referred to; Bell, Prin., paras. 10 to 14A, originally dealt only with complete want of consent—the editor included cases of misrepresentation proper. By combining Glegg on Reparation (1892), chap. x (dealing with Fraud as a Wrong), and Gloag, Contract, 2nd ed., pp. 457–486 (dealing alone with Fraud and Misrepresentation in Contract Law), a fairly complete exposition by Scottish writers is obtainable.

common to civilised mankind that the broad heads are found in all such known systems.

102. Of these interferences by virtue of the inherent judicial power, a large part, but not all, fall within the purview of this article. Such relief as is given from engagements proceeding on essential error [1] is not covered. As will be seen, the remedies allowed for what is called undue influence are not truly connected with fraud, although so closely allied to circumvention as to merit notice in this article.

103. Misrepresentation is the ground of all the reliefs and remedies dealt with. Strictly speaking, and when the word is used in the true sense, there is misrepresentation of fact inherent in and at the basis of every fraud. One may represent falsely, *i.e.* untruly, to his neighbour but yet without moral obliquity or dishonesty, and then the facts are often described as "innocent misrepresentation." But it is well to avoid the term "innocent" in this connection, and to say that misrepresentation *per se* may in the circumstances recognised by the Courts carry certain effects and remedies, but that if the same be proved to be dishonest, doleful, or fraudulent, fraud is established, and may, and will almost invariably, carry further and more drastic legal effects and remedies than misrepresentation by itself.

104. Little of a formal and systematic nature has been written on fraud and misrepresentation in Scotland, and the English books are much taken in aid. These books, and notably Kerr on Fraud and Mistake,[2] adopt the method, apt to become involved, of commencing with an attempted definition of fraud and developing by way of contrast, and within that general exposition, the cases proceeding on estoppel or on misrepresentation, less than fraud. The same expositions divide fraud into three broad classes according to the *media* of operation, viz.: (1) by representation; (2) by persons in a fiduciary position (presumptive or constructive fraud); and (3) miscellaneous frauds. It is thought that the second classification tends to suggest that no dishonestly misleading statement, act, or silence need enter in the cases subsumed; and in consequence tends to sweep in circumstances and remedies not truly samples of fraud at all, contrary to the now leading cases of *Derry*,[3] *Nocton*,[4] and *Robinson*,[5]

SUBSECTION (2).—*Circumvention.*

105. The clearly marked type of remedy known as the action of facility and circumvention may properly be placed among the remedies for fraud. It is true, as after explained, that the second factor is often, or even usually, divided alternately as fraud *or* circumvention, and that certain authorities have sought to find and expound subtle distinctions.

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[1] See ERROR, Vol. VI. p. 282, *ante*.

[2] Sixth edition, 1929.

[3] *Derry* v. *Peek*, 1889, 14 App. Cas. 337.

[4] *Nocton* v. *Lord Ashburton*, [1914] A.C. 932.

[5] *Robinson* v. *National Bank of Scotland*, 1916 S.C. 46; 1916 S.C. (H.L.) 154.

But the remedy in either form in its incidents has all the marks of that given for fraud itself. And it is thought more accurate to say that circumvention proper is a form of fraud, the peculiarity resting in the less onerous conditions of proof which, owing to the peculiar circumstances, the Court will impose.

SECTION 2.—DEFINITIONS.

106. Here it is proposed to define in their relation to one another the primary concepts of representation, misrepresentation, and fraud. Representation involves two (at least) persons capable of legal actings —actings affecting their legal rights in some way. Hence it follows that if representation be truly a necessary element in every fraud, such common concepts as "fraud upon statute" and the like are merely misnomers. Representation involves deliberate action by one upon the mind of another by way of inducing in him the belief in the existence of a state of matters affecting his judgment in entering into, or refraining from, some engagement. Misrepresentation requires no further definition than that the state of matters concerned in the representation should be one false in fact—that is, materially discrepant to or not correspondent with the actuality. Fraud in its acceptation as now properly ascertained necessarily contains the element of representation and of misrepresentation. It carries higher penalties and more drastic remedies, and entails other legal consequences in matters of procedure and pleading; but in order that it should have these results, the person representing positively or negatively must have exhibited something of the nature of dishonesty or fraud in the popular or ordinary moral sense,[1] having intended by his representation, which was a misrepresentation, to induce some person or persons (it may be of a class, and not necessarily the exact person who actually heard or received the untruth and was deceived) to act upon it and alter his or their rights.

107. All these conceptions are only the subject of legal treatment so far as they affect the creation or loosing of rights at law. Certain other legal relationships should be mentioned here, if only to indicate by contrast that with which we are not concerned. Representation was treated in the earlier Encyclopædia as giving rise to liability on various principles of law—(1) as a warranty, *i.e.* as made matter of contract, (2) as involving legal liability on the ground of personal bar, and, perhaps, (3) as amounting (apart from collateral warranty) to a unilateral obligation or promise. On the second head *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* [2] is referred to, and *Jordan* v. *Money*.[3] *Maddison* v. *Alderson*,[4] and *Chadwick* v. *Manning* [5] are referred to on the third head. Both the first and the third heads are correctly regarded as branches of the law of contract or guarantee,[1] and have no place here. Nothing could less induce to accurate thinking than to refuse to recognise that where the question is as to contractual effect the principles of contract must apply, and that, however narrow the line between individual cases, the equitable rules of misrepresentation and fraud should not be interposed. The conception, common in English law, that a person may have to "make good" in form of damages and as matter of contract his representations of fact to his fellow contractor may have no place in our general law, but we may have to note it in the administration of Admiralty law.[2] Such cases as *Clavering, Sons & Co.* v. *Goodwins, Jardine & Co.*[3] should be relegated with *Low* v. *Bouverie*,[4] and perhaps the cases figured in *Clydesdale Bank, Ltd.* v. *Paton* [5] to the sphere of PERSONAL BAR, to which they properly belong.

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[1] *Robinson* v. *National Bank of Scotland*, 1916 S.C. (H.L.) 154.

[2] 1873, L.R. 6 H.L. 352, at p. 360.

[3] 1854, 5 H.L.C. 185, 214, 215.

[4] 1883, 8 App. Cas. 467.

[5] [1896] A.C. 231.

SECTION 3.—RESPECTIVE LEGAL CONSEQUENCES OF MISREPRESENTATION AND FRAUD.

108. Having disencumbered the subject of much that tends to breed confusion, the topic of the legal consequences is comparatively simple. Legal consequences may be distinguished as—(1) criminal and (2) civil. It is clear, now, that all misrepresentations which do not in fact bear the character of *dolus malus*, or fraud, have one, and only one, legal result. Criminally by the common law they have none, although all fraud is punishable doubtless under one or other of the categories enumerated by the writers on criminal law. Civilly such misrepresentations do not lead to damages [6] against the utterer; nor do they lead to allowing an actual executed contract for work at a specified price or rates to be set aside in favour of a contract for work on a *quantum meruit* or *quantum lucratus* basis.[7] They render the transaction voidable at the instance of the person deceived in a question with the deceiver, if the remedy of rescission or reduction is not unavailable.[8] Civilly, fraud (being only a form of misrepresentation) has a similar effect; the fraudulent element not being necessary to that effect, but, it may be, rendering the proof of inducement and materiality easier (fraudulent intention being obvious or established by proof), either by the aid of presumption or because the Court leans towards defeating fraud if established. But fraud also leads to an action of damages. This is founded, in our terminology, *ex delicto*. In England it was known of old as an action on the case for deceit, and now as an action of deceit. It is no longer possible [9] to suggest, as was formerly done, that a wider action based on fraud lies in the Chancery Courts of England, or that the scope of the remedies differs materially in the two countries. It is hardly necessary to add that wherever misrepresentation (or fraud) will yield the remedy of rescission, it forms a good defence to an action for implement, where the plea of *res non integræ* cannot be successfully presented.

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[1] See CONTRACT, Vol. IV. p. 441, *ante*; CAUTIONARY OBLIGATIONS, Vol. III. p. 127, *ante*.

[2] *Owners of S.S. "Magrix"* v. *Carlingnose Granite Co.*, 1929 (not reported).

[3] 1891, 18 R. 652.

[4] [1891] 3 Ch. 82.

[5] 1896, 23 R. (H.L.) 22.

[6] *Robinson* v. *National Bank of Scotland*, 1916 S.C. (H.L.) 154.

[7] *Boyd and Forrest* v. *Glasgow and South-Western Rly. Co.*, 1912 S.C. (H.L.) 93; 1915 S.C. (H.L.) 20.

[8] See *Manners* v. *Whitehead*, 1898, 1 F. 171; *Robey & Co.* v. *Stein & Co.*, 1900, 3 F. 278, at p. 291.

[9] See para. 122, *infra*.

109. So much being said, nearly all is said. For the questions of misrepresentation, of inducement, and of moral fraud are all in the main questions of fact for a jury, or a judge acting as jury. Yet some general rules are established.

SECTION 4.—MISREPRESENTATION.

SUBSECTION (1).—*What amounts to Misrepresentation?*

110. The established propositions are few and not often complicated. There are, nevertheless, some disputable questions. (*a*) What is represented must be a state of affairs existent at the time, or in the past, with reasonable bearing on the present act to be influenced. A statement as to probabilities in the future, or as to the representor's future intentions, will not in general afford a ground of action. (*b*) Generally speaking, what is misstated must be matter of fact. Misrepresentation as to matters of general law will not suffice. For *ignorantia juris neminem excusat.* It is the hearer's duty to know these, or to satisfy himself.[1] (*c*) There is one certain and one less ascertained exception. Mistake induced as to a foreign law (at least by one in the better position to know it) is regarded as arising from a false representation of fact, and leads to rescission, even in marriage.[2] If the word "*jus*" in such statements is used in the sense of something different from general law, as in the expression "private rights of ownership," then it is said equity may intervene where it is against conscience that the other should reap the benefit.[3] "Ignorance of a matter of law arising upon the doubtful condition of a grant is very different from ignorance of a rule of law. Therefore, although when a certain construction has been put by a Court of law on a deed it must be taken that the legal construction is clear, yet the ignorance before the decision of what was the true construction cannot be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed."[4] But perhaps in our system of law the matter is more simply summed up by Lord Watson in *Stewart* v. *Kennedy*.[1] A person contracts in every case to be bound by the construction of his words as these may be construed by a Court of law. But if the error is as to the nature of the contract in the sense in which such error is recognised as essential error, and is induced by the other party, then a case for rescission is relevantly averred. The security of written engagements would be destroyed if a party could (notwithstanding the Court's construction) say, "I understood the deed in another sense." It would not be safe to assume any further equities as given effect to by Scottish Courts of law and equity combined. The views of Lord Chelmsford in *Cooper* v. *Phibbs* [2] were challenged as inadequate by Lord President Inglis in *Stewart* v. *Kennedy*.[3]

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[1] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1, 25; 15 App. Cas. 108; Kerr, Fraud, p. 576; *R.* v. *Mayor of Tewkesbury*, 1868, L.R. 3 Q.B. 629, at p. 635; *Jackson* v. *Stopford*, [1923] 2 Ir. R. 1.

[2] *Leslie* v. *Baillie*, 1843, 2 Y. & C.C.C. 91; 12 L.J. Ch. 153; 60 R.R. 51; *Lendrum or Chakravarti* v. *Chakravarti*, 1929, S.L.T. 96.

[3] Kerr, Fraud, pp. 576, 577; *Cooper* v. *Phibbs*, 1867, L.R. 2 H.L. 149, at p. 170; *E. Beauchamp* v. *Winn*, 1873, L.R. 6 H.L. 223, at p. 234; *Daniell* v. *Sinclair*, 1881, 6 App. Cas. 181, at p. 190 (when mistake was mutual).

[4] Per Lord Chelmsford in *Beauchamp* v. *Winn, supra.*

111. (*d*) The representation must be material and such as would normally be understood as affecting the mind of a person considering such contract or other judicial act.[4] On this question of materiality there has been more room for dubiety than might at first appear.[5] The criterion has been often treated—*Kennedy* v. *Panama Mail Co.*,[6] *Smith* v. *Chadwick*,[7] *Edinburgh Brewery* v. *Gibson's Tr.*,[8] *Stewart* v. *Kennedy*,[9] *Menzies* v. *Menzies*,[10] *Gamage, Ltd.* v. *Charlesworth's Tr.*[11] are only examples. To say that it must be a material part "of the consideration" inducing a contract, seems to confuse the proper and improper meanings of "consideration." It has been said [12] that it is sufficient for rescission that the whole tenor of a statement is misleading, though the pursuer cannot indicate the exact statement which formed the inducement. This seems in conflict with Lord Johnston's views in *Charlesworth*.[13] In *Stewart* v. *Kennedy* [14] Lord Watson appears to say that the five categories of essential error mentioned by Bell in his Principles, at s. 11, "will be found to embrace all the forms of essential error which either *per se* or when induced by the other party to the contract, will give . . . a right to rescind." This seems to be the view of certain earlier judges in the Court of Session, and has been taken up by certain writers.[15] The great authority of Lord Watson notwithstanding, the opinion that materiality is thus limited cannot be regarded as sound if the passage refers to misrepresentation. Representations as to solvency and credit, for instance, are not capable of being placed among the five categories, and it is plain that they afford the remedy if false. As Lord Kinnear says in *Charlesworth*,[13] "The point is that there is a material representation which is false, and which contributes to the conclusion of the contract." Some of these authorities are cases of fraud, but it has nowhere been said that the question of materiality is differently circumstanced where that element intervenes and where it does not. The best guide is Lord Watson in a later case.[1] (*e*) There is an exception to the above rule of materiality (resting on the ground of *uberrima fides*) in the case of contracts of assurance. There every misstatement of fact, even if immaterial and not said to have influenced the contractor, may result in rescission if palpably part of the contract,[2] or even if occurring in a prior proposal form, and without warranty of truth or declaration of truth, it is, by a parenthesis, declared in the formal policy to be the basis of the contract.[3] This carries the doctrine of *uberrima fides* to the extreme. But it probably rests on a formal basis of contract rather than representation.[4] See INSURANCE. The special doctrine has been said to be limited to insurance law; but it is thought that wherever law sees fit to impose (under the title of *uberior* or *uberrima fides*) an obligation to disclose, there the definition of misrepresentation, and therefore of fraud, must be affected. Compare the undernoted cases.[5] (*f*) The person seeking relief must have been induced by the misrepresentation to alter his position in consequence of an erroneous belief arising out of the misrepresentation.[6] It is thus put: There must be *dolus dans causam contractui*, not merely *dolus incidens contractui*; these expressions being used of fraud cases. The counterpart is true of misrepresentation simply. And, of course, it follows that a person who was not in fact in error (not having been deceived) obtains no relief.[7] He is *in petitorio* and must prove the actual belief and the actual reliance. Two instances where it was held that the proof failed were *Smith* [6] and *Charlesworth*.[8] It was at one time thought that the inducement must be substantially the whole inducement (the consideration proper), but *Charlesworth* [8] settled, if necessary, that "it is of no consequence that he was impressed also by other considerations." There must be a false representation "which contributes to the conclusion of the contract."[9]

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[1] *Supra*, at pp. 29-30.

[2] 1867, L.R., 2 H.L. 170.

[3] 1889, 16 R. 857, at p. 863.

[4] Per Lord Johnston in *Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. 257, at p. 269.

[5] Bell's Prin., 111, 475, 514, 522; Arnould, Marine Insurance (11th ed.), p. 78; *Ellinger & Co.* v. *Mutual Life Insurance Co. of New York*, [1905] 1 K.B. 31.

[6] 1867, L.R. 2 Q.B. 580, at p. 587.

[7] 1882, 20 Ch. D. 27; 9 App. Cas. 187.

[8] 1869, 7 M. 886.

[9] 1890, 17 R. 25.

[10] 1893, 20 R. (H.L.) 108.

[11] 1910 S.C. 257.

[12] *Arnison* v. *Smith*, 1889, 41 Ch. D. 348, at p. 369.

[13] *Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. 257, at p. 269.

[14] 1890, 16 R. 857; 17 R. (H.L.) 25, at p. 29.

[15] Cf. *Bennie's Trs.* v. *Couper*, 1890, 17 R. 782; *Woods* v. *Tulloch*, 1893, 20 R. 477 (Lord Kyllachy).

SUBSECTION (2).—*What Circumstances preclude the Remedy of Rescission?*

112. Facts which exclude the remedy of rescission and which, therefore, in the absence of fraud, debar the sufferer from all remedy, may be summarised as follows: (*a*) the remedy is equitable, and hence where there has been undue delay in making the challenge,[1] or, perhaps, where the relief is sought against arrant folly,[2] the Court will not set aside the contract or act; (*b*) so where third parties have innocently and onerously acquired rights through or as a sequel to and dependent on the transaction;[3] and (*c*) generally, *restitutio in integrum* being a condition of the equitable remedy of rescission of voidable agreements, where substantial restitution of all parties is impossible, the remedy does not lie.[4] In *Mulhearn* v. *Dunlop*[5] reduction of an *inter vivos* disposition on the ground of facility and fraudulent circumvention was refused where the fraud was in April 1918, the pursuer had acted as executor under a will dated in 1916 and taking effect in July 1918, and did not propose to disturb the heritable right of a purchaser who had bought the premises in 1924. It was held that s. 46 of the Conveyancing (Scotland) Act, 1924, did not have the effect of permitting an action of reduction to be followed by damages without the power, or desire, to disturb the subsequent *bona fide* owner's right. If it had been held otherwise, there would be a large statutory inroad to record upon the doctrine here set out.

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[1] *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, at p. 142.

[2] 1867, L.R., 2 H.L. 170.

[3] *Dawsons, Ltd.* v. *Bonnin*, 1922 S.C. (H.L.) 156; [1922] 2 A.C. 413.

[4] *Glicksman* v. *Lancashire and General Assurance Co.*, [1927] A.C. 139, per Lord Dunedin, at p. 141.

[5] *Royal Bank of Scotland* v. *Ranken*, 1844, 6 D. 1418; *French* v. *Cameron*, 1893, 20 R. 966; *Railton* v. *Matthews*, 1846, 3 Bell's App. 56; 8 D. 747; *M'Morland's Trs.* v. *Fraser*, 1896, 24 R. 65.

[6] *Smith* v. *Chadwick*, 1884, 9 App. Cas. 187, at p. 190, per Lord Selborne, L.C.; also *Attwood* v. *Small*, 1835, 6 Cl. & Fin. 305.

[7] *Redgrave* v. *Hurd*, 1881, 20 Ch. D. 1, at p. 21.

[8] *Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. 257, at p. 265.

[9] 1910 S.C. 265, per Lord Kinnear.

113. The effect of a supervening sequestration is a question raising considerable doubt. It may be tentatively resolved thus: The contract (as of sale) passes the property subject to the optional right to void the transaction. The property vests in the trustee in sequestration subject to the equitable right to rescind. Where the challenge and claim of right to the subject has been made before the sequestration, that, combined with other circumstances, may preclude others from claiming any interest in the subject merely through the universal diligence which is sequestration. But, on the other hand, mere *brevi manu* retaking possession of the subjects does not operate as rescission, and the equitable remedy may be unavailable to one who equally with other deluded persons, claimants in the sequestration, was the victim of a general course of fraudulent representation of credit.[6] In any event *Eastgate* v. *Ward*[7] and *Watt* v. *Findlay*[8] seem meantime to be overruled or gone past in Scotland. On principle it is suggested that other creditors of a misrepresenter in general (i.) have no real right to retain against the original owner, and (ii.) unless they *bona fide* acquired a right to it through the challenged transaction, cannot plead the general diligence of sequestration as affecting what is not their debtor's. The cases relating to the liquidation of limited companies or joint stock banks, which by some are assigned to the same *ratio* as sequestration, were all in truth decided on various different grounds.[1]

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[1] Bell's Prin., s. 13A; *Price & Pierce, Ltd.* v. *Bank of Scotland*, 1910 S.C. 1095; *Adam* v. *Newbigging*, 1888, 13 App. Cas. 308.

[2] *Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. at p. 269, per Lord Johnston.

[3] *Price & Pierce*, *supra*, at p. 1107.

[4] *Addie* v. *Western Bank*, 1867, 5 M. (H.L.) 80; Bell's Prin., 13A; *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1915 S.C. (H.L.) 20.

[5] 1929, S.L.T. 59.

[6] *Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. at pp. 266 and 267 (and see p. 270).

[7] [1905] 1 K.B. 465.

[8] 1846, 8 D. 529.

SUBSECTION (3).—*Agency in Relation to Misrepresentation.*

114. The misstatement may be made (*a*) by, or (*b*) to, an agent for a principal. Can the principal repudiate as against this other principal? If the misstatement is made by an agent and induces the contract, that may be enough for rescission. Bell, in his Principles, states it, and most of the decided cases assume it;[2] for otherwise the principal in adhering to the contract would be taking advantage of a false representation made for him. If the representation is made to an agent, it appears from *Gamage, Ltd.* v. *Charlesworth's Tr.*[3] that unless the agent is averred and proved to have full authority to complete the transaction it may be necessary to bring knowledge of the representation home by proof to the general manager or other party so empowered.

SUBSECTION (4).—*To what Transactions applicable?*

115. Often as the law of material misrepresentation is formulated as lying within the law of contract—"if a misrepresentation inducing a contract proves false"—it follows from the definition that it is not so limited. All juridical actings may be affected, *e.g.* a donation, although it is not so easy to be sure that the remedy of reduction may be given against it and not affect also all the world, or others interested.

SUBSECTION (5).—*Representation: How made?*

116. This is a topic most often treated under fraud. A representation may be made in any form in which assertions of fact are conveyed seriously by one person to another. If it be done by acts or even hints, instead of express words, or if by silence where (as exceptionally) silence will by reasonable men be construed as assent or affirmation, the onus of proof, always on the propounder of misrepresentation, becomes all the heavier. Fraudulent concealment, which is discussed below, is only one variety of misrepresentation by silence.

SUBSECTION (6).—*General Doctrine subject to Modification by Law of Contract.*

117. These general rules (where deliberate fraud does not enter) may be subject to modification or overruled by other primary doctrines having a more direct place in the nature of the matter at issue. Thus, where the rule of law is *caveat emptor* (*e.g.* sale of goods so far as not varied by statute)—or where in heritage the pre-contract takes the form that nothing is warranted beyond what the express warrandice bears [1]—or where (as in many sales by auction) the bidder is held to have satisfied himself on the particulars, even if the one party proves that he relied on a statement by the other, referable to the scope or condition of the subject-matter itself, he may obtain no relief. The ratio is that the circumstances as stated release the utterer from the duty to regard all he says as necessarily relied upon by his fellow-contractor. The same ratio is probably responsible for the decisions in a number of cases about advertisement of farms to let, wherein statements of the capacity or acreage were contained.[2] While the above view seems sufficient to account for the decisions, it should be said that these cases have sometimes been treated otherwise, as though they were examples of matters which have not been held sufficiently material. If this were a correct view it might affect the whole statement above mentioned as to the law as to materiality.

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[1] See para. 124, *infra*.

[2] *Thin & Sinclair* v. *Arrol & Sons*, 1896, 24 R. 198, at p. 206; *In re Reese River Silver Mining Co.*, 1867, L.R. 2 Ch. 604, at p. 609; *Wheelton* v. *Hardisty*, 1857, 8 E. & B. 232, at pp. 268 and 301; *Addie* v. *Western Bank*, 1867, 5 M. (H.L.) 80.

[3] 1910 S.C. at p. 265, per Lord Kinnear.

SECTION 5.—FRAUD.

SUBSECTION (1).—*General.*

118. It follows from the foregoing treatment of misrepresentation that (strictly speaking) nothing remains but to indicate the important limits within or outwith which dishonesty or fraud can be, or cannot be, held to exist. Fraud has so often been treated at great length, and many of the doctrines applicable to all misrepresentation have been so often stated as under "fraudulent misrepresentation" that the simplification might seem to be excessive. It will, however, be found correct..

SUBSECTION (2).—*Definitions.*

119. Bell in his Principles defined fraud as "a machination or contrivance to deceive." Kerr [3] has a very long and intricate definition intended to cover all the sorts of fraud recognised and to exclude kindred topics. But the definitions are unsatisfactory. The latter is not only cumbrous but it is thought misleading, as it includes much which has by the House of Lords been definitely excluded from the ambit of fraud, *e.g.* "a breach of legal or equitable duty, trust, or confidence." The former definition introduces conceptions more difficult than "fraud" itself. The word "deceit" is vague and likely to be drawn to erroneous conclusions as in the English "action on the case for deceit," and the present "action on deceit." The truth is that fraud (*fraus* or *dolus malus*) is one of those legal concepts taken in all systems direct from human experience and familiar speech. In this branch of law it is really to be applied (although with care) just as ordinarily understood. But, as the leading authorities shew, there must be a purification of its ordinary uses, because there are popular abuses or extensions which are vague or illogical. "General characteristics" of fraud have often been stated. The only two general features which are correctly retained in the doctrine are: (1) the party to be saddled with fraud must have manifested a dishonest intention; (2) as causal sequel thereto, someone must have been caused to act as already described under misrepresentation.[1]

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[1] This appears to be the real ground of decision in *Brownlie* v. *Miller*, 1880, 7 R. (H.L.) 66.

[2] *Grieve* v. *Rutherford's Trs.*, 1871, 9 S.L.R. 60; *Macpherson* v. *Campbell's Trs.*, 1869, 41 Sc. Jur. 634; *Hamilton* v. *Duke of Montrose*, 1906, 8 F. 1026.

[3] Fraud and Mistake, p. 1.

SUBSECTION (3).—*Legal Fraud: Constructive Fraud.*

120. The chief apparent difficulty which has occasioned so much case law and legal discussion centres on the concepts at the head of this subsection. The discussion has hardly yet died out, as witness the 1929 edition of Mr. Kerr's book,[2] quoting in support Sir Frederick Pollock [3] and the late Lord Lindley (or his editor).[3] Such expressions as "the law thrown into confusion" and "unsound doctrine" occur. It should be said that Scots law never contributed anything substantial to this controversy. The law of *Derry* [4] was as clearly stated as ever it was in that leading case, by Lord Pres. Inglis in *Lees* [5] in the year 1882. The only opinion from Scotland quoted by Lord Herschell in *Derry* as requiring any qualification was in a charge of the same judge to a jury.[6] It may have escaped notice that the only issue sent to the jury in that case was one of rescission on the ground of misrepresentation, which did not require fraud, and that the action so far as laid on damages for fraud was held to be irrelevant in respect that an incorporated company cannot in its corporate character be called on to answer in an action for fraud. To Lord Rutherfurd Clark has been ascribed the use of the term "legal fraud." [7] But his exposition of the ground of his opinion is in terms identical with Lord Herschell's second proposition.

SUBSECTION (4).—*The Law of* Derry *v.* Peek.

121. The case of *Derry* v. *Peek* [4] is (with its sequels) the sufficient guide to the present topic. The facts of that case were briefly these: A prospectus issued by a tramway company contained the following statement: "One great feature of this undertaking, to which considerable importance should be attached, is that by the special Act of Parliament obtained the company has the right to use steam or other mechanical motive power instead of horses, and it is fully expected, by means of this, a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses." In point of fact the company had not the right here represented—the employment of steam power, granted provisionally in their Act, being dependent on the sanction of the Board of Trade. When asked, the permission was refused, and the company went into liquidation. Thereupon a shareholder, who had taken shares on the faith of the prospectus, brought an action of damages against certain of the directors personally The House of Lords, reversing the judgment of the Court of Appeal, held that the defendants were not liable in damages for the false statement made in the prospectus. It was held that the defendants *bona fide* believed that the company had the right to use steam power; and thus the absence of reasonable grounds for belief in this statement was not inconsistent with a *bona fide* belief therein. Lord Herschell, after disposing of the supposed authorities on which the Court of Appeal unanimously based their judgment, summed up the law as to fraud in three propositions.[1] One will do well to read two later explanations as additional propositions; and the law is thus formulated:—

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[1] See para. 111, *supra*.

[2] Kerr, Fraud, at pp. 5 and 153 ff.

[3] *Ibid.*, at p. 21.

[4] *Derry* v. *Peek*, 1889, 14 App. Cas. 337.

[5] *Lees* v. *Tod*, 1882, 9 R. 807.

[6] *Western Bank* v. *Addie*, 1867, 5 M. (H.L.) 80; charge at p. 87.

[7] In *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, at pp. 122 to 129.

(1) To sustain an action of deceit (read in Scotland "an action based on fraud") there must be proof of fraud.

(2) Fraud is proved when a false representation is made (*a*) knowingly [or] (*b*) without belief in its truth, or (*c*) recklessly careless whether it be true or false.

(3) If fraud be thus proved, the motive of the guilty person is immaterial. It matters not that he had no intention to cheat (*i.e.* to cheat the person hearing the statement and acting on it).

(4) A false statement made through want of care falls short of, and is a different thing from, fraud, and the same may be said of a false representation honestly believed, although on insufficient grounds.

(5) "If I thought that a person making a false statement had shut his eyes to the facts or purposely abstained from inquiring into them, I should hold that honest belief was absent, and he was just as fraudulent as if he had knowingly stated that which was false."

That the judgment caused alarm in legal and business circles was judicially recognised by several judges of the House of Lords in *Nocton* in 1914.[2] But it is firmly and securely seated in our law, and, it is thought, the grounds for alarm are unsubstantial, with the exception mentioned by Lord Shaw of Dunfermline [3] that the decision had been read as affirming that between promoters or directors seeking new subscribers there does not exist any special relationship involving a duty of care. The action, however, it must be remembered, was, as all the judges pointed out, strictly confined to an action of deceit (delict). It was not laid on negligence.

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[1] *Derry* v. *Peek*, 1889, 14 App. Cas. 374.

[2] *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, at p. 969.

[3] *Nocton*, *supra*, at p. 970.

122. For twenty-five years this great judgment was criticised and canvassed, but applied. In *Angus* v. *Clifford* [1] it was applied where subscribers were invited to their loss by a false statement in a prospectus that mining reports had been made to the directors, when they had not. There was, it was found, culpable carelessness, but not dishonesty. In the Scots Courts judges followed, or rather applied without discussion, the reasoning of *Derry* in *Manners* v. *Whitehead* [2] and numerous cases. In *Le Lievre* v. *Gould*,[3] *Low* v. *Bouverie*,[4] and numerous Chancery cases it was elaborately distinguished, and the rule of law correctly deduced that "there was no legal duty cast upon directors to take reasonable care in forming their belief." Such a doctrine "was a general step of very general application." [5] In the year 1914 the case of *Nocton* v. *Lord Ashburton* [6] went to the House of Lords. A solicitor was said to have misled and defrauded his client in matters of mortgage security and to his own gain. The case was pled as on deceit, but the Lords held that it could stand as a case on negligent breach of the confidential duty of agent to client. They negatived it as a case of fraud. The same doctrines were reinforced; the reluctance to accept them was noted and explained, and room was found under the law of negligence (which does not concern us) for many Chancery cases which had been spoken of or understood under this guise of legal or constructive fraud. In *Robinson* v. *National Bank of Scotland* [7] the relationship of the two sets of authorities was finally cleared up. The Lord Chancellor (Loreburn) should be quoted: [8] "This is an action for false and fraudulent representation. In such an action the pursuer cannot succeed unless he proves dishonesty. There is another kind of action known to the law, namely for some breach of duty arising out of the relations between the parties, as, for instance, where a solicitor is sued for failure to exercise diligence. This class of case was referred to in *Nocton* v. *Lord Ashburton*. It is, however, quite a different proceeding and has nothing to do with fraud, though at one time the word 'fraud' was used occasionally in regard to that form of action also. It is to be hoped that so grave an expression will be confined to cases where the charge involves moral dishonesty."

SUBSECTION (5).—*Cases of Breach of Duty distinguished.*

123. The above cases of *Derry*, *Nocton*, and *Robinson*, it is thought, cover the whole ground. After them (although *Robinson* does not seem to have been duly noticed by English writers) there seems no call to reintroduce "legal fraud" or even "constructive fraud" as

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[1] [1891] 2 Ch. 449.

[2] 1898, 1 F. 171.

[3] [1893] 1 Q.B. 491.

[4] [1891] 3 Ch. 82.

[5] Per Bowen L.J. in *Le Lievre* v. *Gould*, *supra*.

[6] [1914] A.C. 932.

[7] 1916 S.C. 46; 1916 S.C. (H.L.) 154.

[8] At p. 155.

Pollock desires. Certain cases of what might be called statutory fraud will be noticed. But the well-known case of *Slim* v. *Croucher*,[1] like *Le Lievre* v. *Gould*,[2] *Low* v. *Bouverie*,[3] and *Nocton* v. *Lord Ashburton*,[4] falls to be treated under NEGLIGENCE.

SUBSECTION (6).—*Frauds defined by Statute.*

124. Of these there may be said to be several varieties. In the first place the Bankruptcy Statutes create (1) a certain presumption or presumptions of fraud where certain prerequisites occur (see SEQUESTRATION); (2) a statutory fraud in taking goods for credit without disclosing that the taker is an undischarged bankrupt. The peculiarity in the position of directors or promoters who canvass the public for subscriptions to (*a*) an existing or (*b*) a prospective company under the Companies Act, as prominently brought out in *Taylor* v. *Ashton*,[5] *Derry* v. *Peek*,[6] and *Angus* v. *Clifford*,[7] led to an immediate statutory remedy in the Act of 1890, which was amended in the 1908 and 1928 Companies Acts, and the provision now ruling is s. 37 of the Companies Act of 1929. (See COMPANY.)[8] It is now proposed to pass to certain particular topics, which in reality only serve to illustrate the general doctrines.

SUBSECTION (7).—*Certain Rules of Pleading, etc., relating to Fraud.*

125. It was stated at the outset that fraud is so special that certain rules of pleading and presumptions can be predicated as specially appropriate to it. General rules of pleading may be thus stated: (i.) Fraud may be proved by parole evidence; and this is so even though it is sought thereby to overcome the import of a written agreement.[9] So in *Wink*,[10] proof of an alleged fraudulent trust to defeat the rights of future creditors was held not limited to writ or oath, despite the Act 1696, c. 25. (ii.) The averments on which a case of fraud is founded must be clear and specific. It is not sufficient to make a bare averment of fraud: the facts and circumstances from which fraud may be inferred must be set forth. Thus, in *Shedden*[11] Lord Fullerton said: "It is not enough for a party founding a reduction on the head of fraud, to state that fraud has been committed. Fraud is a general term, to be inferred from specific acts. The party, then, must state in what the fraud consists, and what the acts are from which the existence of fraud is to be inferred. And if the facts which he does state are clearly insufficient to support such an inference, the objection of irrelevancy must be sustained. Not that the general allegation of fraud is in itself irrelevant, but that the acts as averred are irrelevant to support the general allegation." The topic can best be studied in actual instances, for which one may refer to the observations of Lord Justice-Clerk Macdonald and Lord Young upon general averments of fraud in *Boustead* v. *Gardner*[1] and other judges in the cases undernoted.[2] Where the action is brought on the ground of fraudulent concealment there is the necessity of averment of breach of duty to communicate the information.[3] In *Burnett* v. *Burnett*[4] and *Ehrenbacher & Co.* v. *Kennedy*[5] there was held to be no relevant averment of *fraus dans causam contractui.* But in *Assets Co.* v. *Shirres' Trs.*,[6] by an apparent exception, diligence was granted for recovery of documents directed to establish general averments of fraud. All their Lordships treated the case as exceptional. The late Mr. Shirres nineteen years before had professed on conscience to make a full disclosure of all assets. The pursuers were able to place their finger on items in his confirmation which had been in existence in 1878 and were not disclosed. A full inquiry was advisable. There existed a clear duty to disclose fully. (iii.) The inference of fraud may be drawn from facts and circumstances.[7] (iv.) If an action is brought against a firm for damages on the ground of fraud, the names of the partners who are alleged to have committed the fraud must be given. "Fraud is always personal; and though a firm may be responsible for the individual fraud of one of its partners acting within the scope of his authority, it is incompetent to charge the firm generally with the fraud."[8] (v.) A pursuer cannot recover damages for fraud if it be shewn that he had knowledge of the facts contrary to the representation, or if he has stated in terms or shewed clearly by conduct that he did not believe and rely on the statements.[9] *Haud enim decipitur qui scit se decipi.* (vi.) When fraud is in issue, the Court is disposed to allow a much wider and more searching call for documents to be used in evidence.

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[1] 1860, 1 D.F. & J. 518; 125 R.R. 529.

[2] [1893] 1 Q.B. 491.

[3] [1891] 3 Ch. 82.

[4] [1914] A.C. 932.

[5] 1843, 11 M. & W. 401.

[6] 1889, 14 App. Cas. 337.

[7] [1891] 2 Ch. 449.

[8] Vol. IV. p. 1, *ante*.

[9] Bell, Prin., s. 2257.

[10] *Wink* v. *Speirs*, 1867, 6 M. 77; cf. *Elibank* v. *Hamilton*, 1827, 6 S. 69; *Marshall* v. *Lyell*, 1859, 21 D. 514.

[11] *Shedden* v. *Patrick*, 1852, 14 D. 721, affd. 1854, 17 D. (H.L.) 18.

126. As to presumptions: (i.) the Court leans strongly against fraud and the proof must be convincing. (ii.) But if the intention to deceive is patently proved, and the device or machination is plain, it will be readily presumed that the statements were material and that the inducement was active. (iii.) Where there exists a special relationship of confidence, as between law agent and client, and the deed in question confers on the confident person an advantage, the presumption will be against the deed, and the onus will be on the recipient of disproving fraudulent influences.[1] It is probably the same presumption that sets up certain rules and practice in the case of facility and circumvention.[2] (iv.) If it is proved that the defender with a view to induce the pursuer to enter into a contract made a statement of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the pursuer did enter into the contract, it is a fair inference of fact (meaning probably a presumptive inference unless displaced) that he was induced to do so by the statement.[3]

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[1] 1879, 7 R. 139.

[2] *Joel* v. *Gill*, 1859, 22 D. 6; *Forth Marine Insurance Co.* v. *Burnes*, 1848, 10 D. 689; 6 Bell's App. 541; *Irvine* v. *Kirkpatrick*, 1850, 7 Bell's App. 186; *Leslie* v. *Lumsden*, 1856, 18 D. 1046; *Broatch* v. *Jenkins*, 1866, 4 M. 1030.

[3] *Liverpool Palace of Varieties* v. *Miller*, 1896, 4 S.L.T. 153.

[4] 1859, 21 D. 813.

[5] 1874, 1 R. 1131.

[6] 1897, 24 R. 418.

[7] See *Gordon* v. *Crauford*, 1730, 1 Pat. 47; *Jaffrey* v. *Allan, Stewart & Co.*, 1790, 3 Pat. 191.

[8] *Thomson & Co.* v. *Pattison, Elder & Co.*, 1895, 22 R. 432, at p. 437, per Lord Kinnear.

[9] *Attwood* v. *Small*, 1838, 6 Cl. & Fin. 232; *Redgrave & Hurd*, 1881, 20 Ch. D. at p. 21.

127. There are two cases (and may be more) where the very nature of a sale implies a representation which (if untrue) affects the transaction with fraud. Where the sale is made by a dealer in "antiques" the principle of *res ipsa loquitur* applies, and the customer will be entitled to assume a representation of age.[4] And where an ordinary sale of goods on credit is proposed, there is *sub silentio* assumed a representation of fact that the buyer intends and is reasonably able to pay,[5] because in shops open for sale the intention of exchange for a price is overwhelmingly presumed. In very similar wise, in *Gibson* [6] the onus of proof was held to be shifted against the defenders, who advertised themselves as manufacturers of cash registers, and exhibited coloured prints of apparently new machines, when it was proved that their salesman furnished one of a series of secondhand machines, which they had reconditioned to look like new, and which bore mystic letters "S.H." within an inside drawer. The onus was on the agent to prove that he brought the secondhand character clearly home to the buyer, and as he failed, fraud on his part was sustained.

128. In the last place may be put the effect of fraud, or alleged fraud, on rules of prescription and limitation of action. Thus the operation of the time limits under the Public Authorities Protection Act, 1893, is excluded where the contract is alleged to have been fraudulently obtained.[7] And in England it has been held that "no length of time will run to protect or screen fraud." [8] Whether in Scotland the long negative prescription would cut off an action based on fraud would seem in principle to depend on whether the fraud was known to the sufferer and he had slept on his right of redress; but this is disputable. See the English cases cited.[9] On the other hand fraud does not elide a plea of *mora* supported by proof of loss of testimony.[10]

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[1] *Grieve* v. *Cunningham*, 1869, 8 M. 317.

[2] See para. 137, *infra*.

[3] Per Lord Blackburn in *Smith* v. *Chadwick*, 1884, 9 App. Cas. 187, at p. 196.

[4] *Patterson* v. *Landsberg & Son*, 1905, 7 F. 675, per Lord Kyllachy.

[5] *Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. 257, at p. 264, per Lord Kinnear.

[6] *Gibson* v. *National Cash Register Co.*, 1925 S.C. 500.

[7] *S. Pearson & Son* v. *Dublin Corporation*, [1907] A.C. 351.

[8] *Allfrey* v. *Allfrey*, 1849, 1 Mac. & G., 87, at p. 99; *Bowen* v. *Evans*, 1848, 2 H.L.C. 257.

[9] *Blair* v. *Bromley*, 1847, 2 Ph. 361; *Vane* v. *Vane*, 1873, L.R. 8 Ch. 383; *In re M'Callum*, [1901] 1 Ch. 143; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A.C. 351, 363.

[10] *Bain* v. *Assets Co.*, 1905, 7 F. (H.L.) 104.

SUBSECTION (8).—*Fraudulent Non-disclosure.*

129. This is more often discussed under the term "fraudulent concealment" (but non-disclosure is better [1]) and has been much and freely canvassed in textbooks and in case law. The matter often leads the student into considerable detail in such cases as those demanding full disclosure or *uberrima fides.* It is thought that it is enough to say that the question is not affected by the word fraudulent. Fraudulent concealment is established wherever there was misrepresentation by way of silence,[2] because by reasonable men that silence would be taken as implying a statement as to facts other than the true facts, and the Court draws the inference of intention to deceive. The following summary of certain cases is given subject to these remarks.

130. Fraud may consist in the suppression of what is true, just as much as in the active representation of what is false. By that must be understood a suppression of fact which to the knowledge of the suppressor leaves his interlocutor with a materially false idea of the subject of dealing. If a man conceals a fact that is material to the transaction, knowing or suspecting or hoping that the other party acts on the assumption that no such fact exists, it is as much a fraud as if the existence of such a fact were expressly denied, or the reverse of it expressly stated.[3] It is not, however, concealment within this doctrine not to tell or disclose any fact, unless the party be under a duty to disclose something, in the particular relation involved by the circumstances.[4] Thus in ordinary transactions falling into known categories, as in the contract of sale, where parties deal at arm's length and the rule *caveat emptor* applies, there is no duty to disclose all facts within the knowledge of either which may reasonably be expected to influence for better or worse the price of the subject to be sold. Simple reticence does not amount to fraud, unless it be with reference to a matter where the party concealing has means of knowledge which the other has not, and the latter is entitled to rely on the knowledge being imparted.[5] But the statement of the doctrine implies qualifications which are obvious to common sense. Thus (1) anything in the nature of active concealment is fraudulent, as where, for example, details of the value of a property were given by a seller, and one material fact kept back.[6] So (2) a partial statement may amount to an untrue statement. The test is that given in the beginning of this subsection.[7]

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[1] Per L. Ch. Cairns in *M'Pherson's Trs.* v. *Watt,* 1877, 5 R. (H.L.), 9, at p. 15.

[2] See para. 116, *supra.*

[3] *Peek* v. *Gurney,* 1873, L.R. 6 H.L. 377, at p. 400.

[4] *Irvine* v. *Kirkpatrick,* 1850, 7 Bell's App. 186.

[5] *Duthie* v. *Carnegie,* 21st Jan. 1815, F.C.

[6] *Jones* v. *Rimmer,* 1880, 14 Ch. D. 588.

[7] See *Arkwright* v. *Newbold,* 1881, 17 Ch. D. 301, per James L.J. at p. 318; *Emma Silver Mining Co.* v. *Grant,* 1878, 11 Ch. D., 918, at p. 935, per Jessel M.R.

SUBSECTION (9).—*Alternative or Cumulative Remedies.*

131. In the undernoted cases questions have been mooted,[1] and regarded as disturbing, as to whether the two remedies by rescission and by damages are cumulative, or are alternative in the option of the sufferer; whether, accordingly, a time arrives when he must elect, or be held to elect; and, again, if rescission be excluded, whether he can have damages at all. It was said by Lord Watson [2] that there was a great deal of difficulty as the decisions then stood. It is thought that the matter, while not beyond discussion, is not so difficult. It seems admitted that the remedies are alternative: it follows that a man may, instead of reducing, claim damages from the deceiver. If so, it is not illogical to abide by the contract or transaction, and liquidate one's loss in money. Nor is that statement obnoxious to the criticism that one takes the benefit of the transaction and yet sues for damages. For so far as the transaction is lucrative it will extinguish or minimise the loss. Nor, it is thought, where the actual deceiver was an agent, can it be any answer to that agent to plead that the (*ex hypothesi*) *damnosa* transaction has not been given up. It would, on the other hand, be most unfair to impose the "election" view in the case where the ground of challenge (falsity of representation) only emerged to knowledge after third-party interests had been created to bar rescission. A dictum of Lord Kinnear may be referred to.[3] It merely expresses a doubt.

132. The assumption common to a number of opinions expressed in these cases that the defence or attack based on a false and fraudulent representation (of profits or of a physician's practice or the like) is merely an *actio quanti minoris*, appears to be erroneous. The claim is one of damages for a wrong, and a delict. It may compensate for a minor-value, but is not based on it. Compare *Smart* v. *Wilkinson*,[4] where for that very reason the defence required a separate and substantive action.

SUBSECTION (10).—*Agency in Questions of Fraud.*

133. Here again legal discussion has been free. The general rules anent agency for the utterer or receiver of untrue statements are, generally speaking, the same as those for simple misrepresentation.[5] Certain predispositions react a little in case of fraud. There is a strong presumption against a direct employment to commit fraud, although that is perhaps little in consistence with human nature. Consequently there was of old a tendency to hold all such cases as outwith the agency. It is useless to go back beyond *Barwick* v. *English Joint-Stock Bank.*[1] The nature of the remedy sought seems to create differences. If the principal seeks to enforce by an action for implement, or *ad factum præstandum*, a contract obtained by his agent's (unknown) fraud, the Court will probably always refuse. If, after part implement, he desires to oppose rescission, it is usually put that he should not be allowed to avail himself of his agent's fraud. If, on the other hand, damages are sought against him, there may be more reluctance, and greater disposition to say that the principal is not affected by the fraud. Correctly speaking, while no person is presumed to authorise either a delict or a quasi delict, it is logically possible to hold that responsibility rests where the servant or agent commits only *quasi* delicts, and that it does not rest where he commits delict, especially of the nature of crime.[2] The rule of *Barwick* is usually taken as establishing that there is no sensible distinction to be drawn between the case of fraud and the case of any other wrong. But it is thought that wherever the mandate was of the nature that the agent had general power to conclude bargains, any distinction is difficult to maintain. The agent having committed the delict is always personally liable in damages.[3]

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[1] *Tulloch* v. *Davidson*, 1858, 20 D. 1045; *Graham* v. *Western Bank*, 1865, 3 M. 617; *Amaan* v. *Handyside & Henderson*, 1865, 3 M. 526; *Dobbie* v. *Duncanson*, 1872, 10 M. 810; *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325; *Clough* v. *London and North-Western Rly. Co.*, 1871, L.R. 7 Ex. 26, per Mellor J. at p. 34; *Addie* v. *Western Bank*, 1867, 5 M. (H.L.) 80; *Houldsworth* v. *City of Glasgow Bank*, 1879, 6 R. 1164, at p. 1174, 1183; 1880, 7 R. (H.L.) 53; *Brownlie* v. *Miller*, 1880, 7 R. (H.L.) 66, at p. 83.

[2] *Brownlie* v. *Miller*, *supra*, at p. 84.

[3] *Brown* v. *Stewart*, 1898, 1 F. 316, per Lord Kinnear at p. 323.

[4] 1928 S.C. 383.

[5] See para. 114, *supra*.

134. The undernoted cases [4] illustrate the liberalising tendency to look more to the remedy of the wronged person. In the last case, *Gibson*,[4] the principal was entirely exonerated of evil intention, and the agent was as clearly proved to have committed a fraud on the buyer, and the Court had no difficulty with the question of responsibility. So in *Robb* [4] Lord M'Laren, after pointing out that it was part of a stockbroker's business not only to obtain for his client but to furnish to his client share certificates for his purchases, adds: "I think, therefore, that if within a reasonable time after the transfer had been executed the pursuer had written desiring that his certificates should be sent to him, it would have been no defence to his demand to say that the certificates were misappropriated by the defender's clerk." [5] And Lord Atkinson in *Boyd & Forrest* (2nd case)[6] said that to hold otherwise, if fraud of the engineer were proved, than that the company must pay additional money as *quantum meruit*, would have been to decide in effect that the defenders should profit by "their own wrong."

SUBSECTION (11).—*Fraud in Criminal Law.*[7]

135. The above treatment of the civil consequences leaves little to be said as to the treatment of fraud in the criminal Courts. The full acceptance of the doctrine of *Derry* renders it certain that (while civil Courts do not concern themselves with amenity to the criminal Courts—they ignore the criminal aspect) fraud, if established, must always infer moral wrong of a deliberate nature. Generally speaking, then, all frauds will be assumed to be justiciable in the criminal Courts at common law, or they have been made so by aid of statutory provision, where it has seemed necessary to supplement the common law. The general and old-established name under which such prosecutions are brought is "falsehood, fraud, and wilful imposition."[1] Embezzlement, though included under the group of actions "inferring dishonesty," is not an instance of fraud. It does not depend upon influencing the victim's mind. Nor is telling a falsehood simpliciter a crime by the law of Scotland. In order to libel fraud relevantly even in the barest form of "You did defraud X," it is a necessary preliminary to libel circumstances shewing that there was an intentional misrepresentation, as, for instance, that the delivery of the subject was obtained by the use of a worthless cheque. It has been held in relation to a number of statutory offences that it is necessary in order to establish them to libel and prove dishonest or fraudulent intention.[2]

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[1] 1867, L.R. 2 Ex. 259.

[2] *Robb* v. *Gow Bros. & Gemmell*, 1905, 8 F. 90.

[3] *Cullen* v. *Thomson's Trs.*, 1862, 4 Macq. 424, per Lord Wensleydale.

[4] *British Mutual Banking Co.* v. *Charnwood Forest Rly. Co.*, 1887, 18 Q.B.D. 714; *Clydesdale Bank* v. *Paul*, 1877, 4 R. 626; *Hockey* v. *Clydesdale Bank*, 1898, 1 F. 119; *Robb* v. *Gow Bros. & Gemmell*, 1905, 8 F. 90, at pp. 96 and 100; *Gibson* v. *National Cash Register Co.*, 1925 S.C. 500.

[5] 1925 S.C. 500.

[6] *Boyd & Forrest* v. *Glasgow & South-Western Rly. Co.*, 1915 S.C. (H.L.) 20, at p. 35.

[7] Macdonald's Criminal Law (ed. R. M. Mitchell, 1928); Anderson, Criminal Law.

SUBSECTION (12).—*Fraud in relation to Decrees.*

136. Although cases of actual relief are few, there is no doubt that fraud upon the Court—that is, fraudulent methods of blinding the Court who have to decide a case—will invalidate even a decree at the instance of anyone having a proper interest to intervene, *i.e.* anyone whose rights at the time were and are invaded by the fraud, and who had not the opportunity to intervene. This would be true even if status were involved and the decree was that of a foreign Court. Reference may be made to *Walker* v. *Walker*,[3] and to the dicta in *Von Lorang* v. *Austrian Administrator*.[4]

SECTION 6.—FACILITY AND CIRCUMVENTION.[5]

SUBSECTION (1).—*General.*

137. Of this long-established head of relief against deeds (which in practice is much associated with a totally different topic, namely, incapacity), it may well be said that it was explored earlier and with more fullness than fraud generally. But it is in truth only part of the law of fraud, where the "machination" takes a particular form, appropriate to minds of less than normal strength. Circumvention is actually used by the civilians to define fraud—"*dolus malus ad circumveniendum.*[1]

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[1] *Tapsell* v. *Prentice*, 1911 S.C. (J.) 67; *Mather* v. *H.M. Advocate*, 1914 S.C. (J.) 184, at p. 186; cf. *Rae* v. *Linton*, 1874, 3 Coup. 67; 2 R. (J.) 17.

[2] The Tramways Act, 1890, s. 51; The Glasgow Corporation Act, 1907, s. 60; Burgh Police (Scotland) Act, 1892, c. 430. See *Nimmo* v. *Lanarkshire Tramways Co.*, 1912 S.C. (J.) 23; *Mather*, *supra*; *Galbraith's Stores, Ltd.* v. *M'Intyre*, 1912 S.C. (J.) 66.

[3] 1911 S.C. 163.

[4] 1927 S.C. (H.L.) 80; [1927] A.C. 641.

[5] Bell, Com. i. 136; Bell, Prin., 14; Kerr, Fraud, 5th ed., p. 319.

138. According to Lord Stair,[2] "Circumvention signifieth the act of fraud whereby a person is induced to a deed or obligation by deceit." The expression is usually found in conjunction with "facility," where it is sought to reduce a deed under the well-known issue of facility and circumvention. But it is also in familiar use in cases of undue influence. The usual form of issue presents two questions to the jury: (1) whether the granter of the deed was weak and facile and easily imposed on; and (2) whether the defender (or others, as the case may be), taking advantage of the said weakness and facility, did by fraud or circumvention obtain from the granter the said deed to his lesion. Lesion co-existing with weakness of mind of itself affords no ground for reduction. Thus Erskine[3] says: "Though a deed under challenge should appear hurtful to the granter, and irrational for one in his situation, if it do not carry in its bosom plain marks of oppression it is not reducible without an actual proof of dole, even though the granter should appear to be of a facile temper, *i.e.* apt to be imposed upon. . . . Yet where lesion in the deed and facility in the granter concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." Instances may be found in the cases undernoted.[4] It is now put to the jury alternatively whether there has been fraud or circumvention in the impetration of the deed.[5] But in a very recent case, while the issue took the ordinary form "or," the judges in their opinions used the cumulative "and." [6] Fraud and circumvention, it has been said, are just two shades of the same thing; the two pass into each other by such shadowy gradations, that they are often difficult to distinguish. If a distinction, however, is to be drawn, circumvention seems more appropriately applied to a course of deception than to a single act of deceit; and hence in many cases the Court have refused to interfere with the verdict of a jury in favour of a pursuer, although there was no direct evidence of particularity in the fraud.

SUBSECTION (2).—*How the Proof of Facility affects the Proof of Fraud.*

139. In dealing with what are the essentials which must be proved in an issue of facility and fraud or circumvention, Lord Justice-Clerk Hope, in *Clunie,*[6] said: "It was contended that we must find some positive fact proved which amounts in itself to a distinct act or piece of circumvention, some trick, some particular practising on the mind of the party at a particular time; some details, in short, as to the acts and practices which the general term circumvention includes; and that, if one cannot lay one's hand on distinct instances, detected and proved, of particular acts and practices amounting to circumvention, there is no ground for supporting the verdict. If such a view were taken of the question to be investigated under the second issue (*i.e.* of facility and circumvention), and of the mode in which alone it was competent for a jury to arrive at a verdict on that issue, I believe nineteen out of twenty of the cases in which deeds have been set aside under this issue must have failed. The correct view of the matter is quite different. . . . What passes is commonly with some one party, either the defender or an agent, and is either unknown, or, if such party is examined, all practices may be positively denied, which raises a question as to his veracity for the jury. But if the facts satisfy the jury that there was in such party a motive to mislead and induce him to enter into the transaction, either for his own benefit or for the benefit of someone whose interest he was promoting, and that only under persuasion and untrue representations, acting on a mind facile or nervously anxious, from disease, on the subject, could have brought about the result, then it is for the jury to say whether they draw from the whole case the inference of circumvention." Accordingly the word "impetrate" for the more or less prolonged act of obtaining such *inter vivos* or *mortis causa* deeds has become almost a word of style.

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[1] See Gloag, Law of Contract, 5th ed., s. 632.

[2] Stair, Inst. i. 9, 9.

[3] Ersk. Inst., iv. 1, 27.

[4] *Scott* v. *Wilson*, 1825, 3 Murray 518, at p. 526; *M'Kirdy* v. *Anstruther*, 1839, 1 D. 855.

[5] *Mann* v. *Smith*, 1861, 23 D. 435.

[6] *Clunie* v. *Stirling*, 1854, 17 D. 15, at p. 18.

140. To reduce a deed, there must be some correspondence between the facility and the kind of arts alleged to have been employed against the granter.[1] The rules of pleading applicable to ordinary fraud are relaxed for reasons stated in *Clunie* and other cases;[2] so that if facility be assumed proved, the arts and devices (in the presence, at least, of independent averments of other unfair dealings) may be sufficiently covered by a general averment of "impetration."[3]

SUBSECTION (3).—*What Parties are affected.*

141. In an action to set aside a will, the fraud founded on as having led to the impetration of the deed is very commonly that of a person taking benefit, but it need not have been employed by the beneficiaries, for no party, however innocent, is entitled to take benefit by a fraud.[4] In *Love* v. *Marshall*[5] intimidation was coupled with fraud or circumvention. For other illustrative cases see those undernoted.[6]

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[1] *Morrison* v. *M'Lean's Trs.*, 1862, 24 D. 625.

[2] *Boyse* v. *Rossborough*, 1856, 6 Cl. H.L. Ca. 49; *Love* v. *Marshall*, 1870, 9 M. 291, at p. 294; *Rooney* v. *Cormack*, 1895, 22 R. 761.

[3] *Horsburgh* v. *Thomson's Trs.*, 1912 S.C. 267, per Lord Ormidale (L.O.), at p. 271, per Lord President, at p. 272.

[4] *Taylor* v. *Tweedie*, 1865, 3 M. 928; *M'Culloch* v. *M'Crackan*, 1857, 20 D. 206; *M'Kellar* v. *M'Kellar*, 1861, 24 D. 143.

[5] *Love* v. *Marshall*, 1870, 9 M. 291.

[6] *Crichton* v. *Henderson's Trs.*, 1898, 1 F. 24; *Jackson* v. *Pollok*, 1900, 8 S.L.T. 267; *Sutherland* v. *W. M. Low & Co., Ltd.*, 1901, 3 F. 972; *Spring* v. *Martin's Trs.*, 1910 S.C. 1087.

SUBSECTION (4).—*Tribunals.*

142. This type of case has been regarded as specially suitable for jury trial.[1] But in *Forrests*,[2] where there was also a question of undue influence, inquiry was by way of proof. The recent cases of *Gibson's Exr.* v. *Anderson*,[3] and *Mulhearn* v. *Dunlop*,[4] may also be consulted.

SUBSECTION (5).—*Is Partial Reduction competent?*

143. It seems that the law demands complete rescission of a deed affected with this sort of fraud, and that although innocent parties or beneficiaries may thereby suffer. In *Horsburgh*,[5] however, it was sought to reduce only the purported deletions on a will and two later codicils, and in sending the case to trial the Court did not make any comment on this partial reduction.

SECTION 7.—NOTE ON UNDUE INFLUENCE.

SUBSECTION (1).—*Introductory.*

144. Cases where the relief granted is placed on the ground of undue influence have so often been treated in close conjunction with circumvention that it is impossible to omit the topic here. But it must be understood that these are not strictly cases of fraud, and do not bear the same relation to (*a*) remedies, or (*b*) rules of pleading and presumptions, as do cases of fraud proper. The law of Scotland is perhaps less developed on this line than that of England, and it is hardly safe to assume that the rules of that system will all be adopted here.[6]

SUBSECTION (2).—*To what Cases applicable.*

145. Without actual proof of facility in the granter of a deed, acts of circumvention falling short of fraud do not warrant reduction, except in the special case where a party acquiring a benefit has abused a position of trust and influence. To this form of circumvention is given the specific name of "undue influence." The remedy is restoration to the estate, and those interested in it, of any benefits taken under such influence. No case of damages awarded appears in the books on this ground. In England, where the doctrine has been more developed than in Scotland, relief is given, not only where the parties stand in a fiduciary relation to one another, but also where persons clothe themselves with a character which brings them within the range of the principle which is held to apply to all the variety of relations by which dominion may be exercised by one person over another.[1] Thus, jurisdiction in relieving against transactions has been exercised in actions between medical man and patient,[2] keeper of lunatic asylum and patient,[3] minister and person under spiritual influence,[4] young man in regiment and superior officer,[5] and near relations.[6]

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[1] *Horsburgh* v. *Thomson's Trs.*, 1912 S.C. 267, per Lord Ormidale (L.O.), at p. 271, per Lord President at p. 272; *Houston* v. *Aitken*, 1912 S.C. 1037.

[2] *Forrests* v. *Low's Trs.*, 1907 S.C. 1240.

[3] 1925 S.C. 774.

[4] 1929, S.L.T. 59.

[5] *Horsburgh* v. *Thomson's Trs.*, *supra*.

[6] Kerr, Fraud and Mistake, p. 317, may be consulted, with due respect to Scots habits of thought and pleading.

146. The doctrine of undue influence is not so copiously illustrated in Scotland. In *Gray* v. *Binny* [7] Lord Shand adopted the English view, that, without affirming either facility, or fraud, or circumvention, a Court may give relief where undue influence has been used to procure a deed to his own advantage by a person enjoying a position of confidence and trust. He says: "The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance. In such circumstances the Court is warranted in holding that undue influence has been exercised." In that case a deed of disentail, granted by a young man of twenty-four, was reduced on the ground that it had been obtained from him by his mother and her solicitor by taking advantage of the son's ignorance of his rights and his confidence in them. The case was tried by a judge. The other judges in the Inner House did not adopt *in toto* the reasoning of Lord Shand. Lord Deas said that, if the case had gone to a jury, it might quite well have been tried under the ordinary and well-established issue of facility coupled with fraud or circumvention, to the lesion of the granter of the deed.

147. The earliest case in which undue influence was allowed as a separate issue is *Harris* v. *Robertson*.[8] That was an action of reduction of a disposition by a client in favour of his law agent; and one of the issues approved of was: "Whether the defender, being at the time the law agent of the deceased A., did wrongfully, and in violation of his duty as agent foresaid, induce the said A. to enter into the minutes of agreement to the lesion of the said A." A law agent's position, however, is peculiar.[9] The law examines with particular strictness into the circumstances under which any provision in his favour is obtained from a client. In *Grieve* v. *Cunningham* [10] Lord Barcaple said: "In many, perhaps in most cases, the presumption against the deed created by the mere circumstance that the party favoured is the law agent who prepared it, will supply the want of all other elements of fraudulent impetration."[1] A gift by a client in favour of his law agent is voidable at the instance of the client so long as the relation of agent and client subsists;[2] but a challenge may be barred by the actings of the client subsequent to the time when the relation was terminated. The presumption against the deed is not irrebuttable, and in the latest case the law agent successfully undertook the onus of satisfying the Court that the benefit was uninfluenced. Reference may be made as to the whole doctrine to the undernoted cases.[3]

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[1] *Huguenin* v. *Baseley*, 1807, 14 Ves. 273; *Morley* v. *Loughnan*, [1893] 1 Ch. 736, at pp. 753, 756.

[2] *Mitchell* v. *Homfray*, 1881, 8 Q.B.D. 587.

[3] *Wright* v. *Proud*, 1806, 13 Ves. 136.

[4] *Huguenin*, *supra*; see *Allcard* v. *Skinner*, 1887, 36 Ch. D. 145.

[5] *Lloyd* v. *Clark*, 1843, 6 Beav. 309.

[6] *Sturge* v. *Sturge*, 1849, 12 Beav. 229.

[7] 1879, 7 R. 332; cf. *Carmichael* v. *Baird*, 1899, 6 S.L.T. 369.

[8] 1864, 2 M. 664.

[9] See dicta in the House of Lords in *Watt* v. *M'Pherson's Trs.*, 1877, 5 R. (H.L.) 9.

[10] 1869, 8 M. 317, at p. 322.

SUBSECTION (3).—*Onus.*

148. It seems that cases can be distinguished according as there is or is not a proper fiduciary relation. Where a fiduciary relation exists, the Courts will presume confidence placed and influence exerted, and the transaction will not stand unless the donee proves that the donor had competent and independent advice, and that he entered into the transaction voluntarily and deliberately, knowing its nature and effect, and that his consent was not obtained by the exercise of the influence to which the relation gave rise. Where fiduciary relationship does not exist, the confidence and the influence must be proved *aliunde.* A relationship unlawfully constituted, as in the case of a man and woman living in adultery, is not a fiduciary relationship,[4] but, *semble*, relief would be given if confidence and influence were proved, and the confidence had been abused.[5]

SUBSECTION (4).—*In Mortis Causà Deeds.*

149. The rules as to undue influence above explained are those applicable to transactions *inter vivos*, but do not apply to wills and other *mortis causa* deeds.[6] In the ordinary case, undue influence, in order to invalidate a will, must amount to coercion or fraud. In *Weir*[7] Lord Halsbury, L.C., quoted the following dictum of Lord Cranworth, L.C. (in the English case of *Boyse* v. *Rossborough*),[8] with approval, as an accurate exposition of the general law: "I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife by falsehood raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions, which she knows he thus had formed to their disadvantage, may never be removed, such contrivance may perhaps be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud." The case with which Lord Cranworth was dealing was a case between husband and wife, which has always been regarded in England as an exceptionally difficult case. But in *Weir* that specialty was absent. It is thought that in Scotland all cases except those of special positions [1] will be tried under the ordinary issue of facility and circumvention. If the mind of the testator is absolutely sound in the testamentary sense, it is extremely difficult to see why he or she should be precluded from consulting a spouse or other near relation, under pain of forfeiting his whole beneficial provisions, if the advice is said to be "unduly" influential.

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[1] See also *Cleland* v. *Morrison*, 1878, 6 R. 156; *Anstruther* v. *Wilkie*, 1856, 18 D. 405; *Watt* v. *M'Pherson's Trs.*, 1877, 5 R. (H.L.) 9.

[2] *Logan's Trs.* v. *Reid*, 1885, 12 R. 1094.

[3] *Tennent* v. *Tennent's Trs.*, 1870, 8 M. (H.L.) 10; *Grahame* v. *Ewen's Trs.*, 1828, 6 S. 479; *Smith Cuninghame* v. *Anstruther's Trs.*, 1872, 10 M. (H.L.) 39; *Wardlaw* v. *Mackenzie*, 1859, 21 D. 940; *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108.

[4] *Hargreave* v. *Everard*, 1856, 6 Ir. Ch. 278; cf. *Coulson* v. *Allison*, 1860, 2 De G. F. & J. 521; *M'Kechnie* v. *M'Kechnie's Trs.*, 1908 S.C. 93.

[5] *Hargreave, supra.*

[6] *Forrests* v. *Low's Trs.*, 1907 S.C. 1240, per Lord Kinnear, at p. 1256; 1909 S.C. (H.L.) 16.

[7] *Weir* v. *Grace*, 1899, 2 F. (H.L.) 30, per Lord Halsbury L.C. at p. 31; *Forrests, supra.*

[8] 1856, 6 Clark (H.L.) 2, at p. 47.

150. Where a law agent prepares a will in his own favour the onus is on him to shew that the will was the deliberate act of the testator.[2] It would appear that any persuasion on the part of the agent would invalidate the will.[3] But "although there is an onus on the law agent in these circumstances, that does not imply that he may be required to prove a negative, or to exclude indefinite possibilities for which no foundation has been laid in evidence. If he gives a clear and consistent account of his conduct, which satisfies the judge before whom he is examined of his perfect honesty, and if his own evidence, being credible in itself, is supported by the other evidence in the case, and if he is able to displace any inference of fact which may be *prima facie* unfavourable,

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[1] See para. 151, *infra.*

[2] *Grieve* v. *Cunningham*, 1869, 8 M. 317; *Weir* v. *Grace*, *supra*, per Lord Robertson; *Forrests* v. *Low's Trs.*, 1907 S.C., per Lord Kinnear at p. 1256.

[3] See *M'Kechnie* v. *M'Kechnie's Trs.*, 1908 S.C. 93, per Lord Justice-Clerk at p. 98; *Forrests* v. *Low's Trs.*, *supra*, per Lord Kinnear.

I see no good ground for holding that he must nevertheless be found to have failed in discharging the onus incumbent on him."[1] That the question arises only from the presumptions of the case is shewn by this that where a testator makes a will in favour of his solicitor, but the solicitor is not employed in the preparation of the will, the onus is on the person challenging the will to prove undue influence amounting to coercion or fraud.[2] Indeed, generally, the rule is this: "We have to consider not a fixed and rigid rule of law, but a presumption of fact, the force of which must vary with the circumstances of the case" (Lord Kinnear). The question is not one of "disqualification," and taking a benefit is only "a circumstance which ought generally to excite the suspicion of the Court."

151. In *M'Kechnie*[3] it was laid down that the doctrine of undue influence applied only to the case of persons who held an official position towards the testator, as, for instance, his doctor, his solicitor, and his clergyman (see especially the opinion of the Lord Justice-Clerk), and did not apply to the case of husband and wife. A paramour's was not such a relationship as to bear the presumption of special duty. She owes no duty towards the man with whom she is living, and cannot possibly betray his confidence in her.[4] By undue influence must necessarily have been meant undue influence falling short of coercion or fraud. Undue influence exercised by coercion or fraud would be fatal by whomsoever it was exercised, but this of course subject to the ordinary rules about these two independent topics. It is not clear, however, that a doctor or a clergyman, or a voluntary *negotiorum gestor* who may be concerned in the making of a will, is exactly in the same position as a law agent.[5] Any onus of proof which may rest on such persons would seem to arise, not from a rigid rule of law, but from a presumption of fact varying with the circumstances of the case.[6] In the undernoted cases an issue of undue influence was refused.[7]

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[1] *Forrests* v. *Low's Trs.*, 1907 S.C. 1240.

[2] *Weir* v. *Grace*, 1899, 2 F. (H.L.) 30. per Lord Halsbury L.C. and Lord Robertson.

[3] 1908 S.C. 93.

[4] 1908 S.C., at p. 101, per Lord Stormonth Darling.

[5] *M'Kechnie* v. *M'Kechnie's Trs.*, 1908 S.C. 93, per Lord Justice-Clerk; *Forrests*, *supra*, per Lord Kinnear, quoting dictum of Lord Brougham in *Hunter* v. *Atkins*, 1834, 3 My. & K. 113; *Munro* v. *Strain*, 1874, 1 R. 522, per Lord Justice-Clerk Moncreiff at p. 525.

[6] *Forrests* v. *Low's Trs.*, *supra*, per Lord Kinnear.

[7] *Munro* v. *Strain*, *supra*; *M'Callum* v. *Graham*, 1894, 21 R. 824; *Rooney* v. *Cormack*, 1895, 22 R. 761.

MISSIVES.

See LEASE; SALE; STAMPS.

MOBBING.

See CRIME.

MOBILIA SEQUUNTUR PERSONAM.

MOBILIA SITUM NON HABENT.

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MONEY.

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SECTION 1.—DEFINITION.

152. Money is the circulating medium of the country. It consists of coin and bank notes.[1] Unlike other corporeal moveables, it cannot be identified in the possession of another than the owner, unless separated and marked for that purpose.[2] The coins are of gold, silver, or bronze. A tender of payment is legal if made in coins issued by the Mint in accordance with the Coinage Acts, 1870 [3] and 1891,[4] and not called in by proclamation, nor become diminished in weight by wear or otherwise, so as to be of less than the minimum statutory weight.[5] Gold coins are legal tender for a payment of any amount; silver coins are legal tender for only forty shillings; and bronze coins for only one shilling.[5] Tokens and coins made otherwise than by the Mint are no longer legal.[6] All contracts and dealings relating to money, or involving payment of or liability to pay money, must be made according to the coins which are current and legal tender under the Act, and not otherwise, unless made according to the currency of some British possession or some foreign state.[7]

153. By s. 14 of the Criminal Procedure (Scotland) Act, 1887,[8] the word " money " when used in an indictment includes all current coin of the realm, post-office orders and postal orders, and bank and bankers' notes; and it is no longer necessary to specify whether the money consisted of gold, etc., it being sufficient to state the sum as consisting of money. In construing certain testamentary writings which were expressed in popular language, the Court held that the word " money " and " moneys " included the testator's whole moveable estate which had not otherwise been specifically disposed of.[9]

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[1] See BANK, Vol. II. p. 54.

[2] Bell's Prin., s. 1333.

[3] 33 & 34 Vict. c. 10.

[4] 54 & 55 Vict. c. 72.

[5] 33 & 34 Vict. c. 10, s. 4.

[6] *Ibid.*, s. 5.

[7] *Ibid.*, s. 6.

[8] 50 & 51 Vict. c. 35.

[9] *Easson* v. *Thomson's Trs.*, 1879, 7 R. 251, and *Dunsmure* v. *Dunsmure*, 1879, 7 R. 261.

Section 2.—Scots Money.

154. In the older Acts of Parliament, sums of money are expressed in *Money Scots*. The latter bears, approximately, the proportion of $\frac{1}{12}$ of sterling money of the same denomination.[1]

A doyt or penny is	£0	0	$0\frac{1}{12}$
A bodle or twopence is . . .	0	0	$0\frac{1}{6}$
A plack or groat, or fourpence, is .	0	0	$0\frac{1}{3}$
A shilling or three placks is . .	0	0	1
A merk or 13s. 4d. ($\frac{2}{3}$ of a pound) is .	0	1	$1\frac{1}{3}$
A pound is	0	1	8

Section 3.—Bullion.

155. Bullion is gold or silver in the lump, as distinguished from coin or articles manufactured from gold or silver. The term is also applied to coin and articles made of gold or silver when considered simply with reference to their value as raw material. The purity of gold is measured by twenty-fourth parts. In their pure state gold and silver are too soft to be used alone for the manufacture of coin, and for the purpose of hardening them a certain alloy is mixed. To the product the term bullion is usually applied. Ever since 1553, in the reign of Edward VI., the bullion used for the gold coinage has been twenty-two carats of pure gold and two carats of alloy. The standard of silver was fixed by William the Conqueror at 11 ozs. 2 dwts. fine, or 222 dwts. of pure silver to 18 dwts. of alloy. Since these standards were established they have, with the exception of a short period of confusion from the 34th Henry VIII. (1543) to Elizabeth, been maintained.[2]

156. All persons are entitled to demand from the issue department of the Bank of England, Bank of England notes in exchange for gold bullion, at the rate of £3, 17s. 9d. per ounce of standard gold; but before payment the bank are in all cases entitled to require such gold bullion to be melted and assayed, by persons approved by them, at the expense of the parties tendering such gold bullion.[3] The Treasury may from time to time issue to the Master of the Mint, out of the growing produce of the Consolidated Fund, such sums as may be necessary to enable him to purchase bullion in order to provide supplies of coin for the public service.[4]

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[1] See Tait's Justice of Peace; Barclay's Justice's Digest, *voce* "Money Scots."

[2] Macleod, Theory and Practice of Banking, vol. i. p. 143.

[3] 7 & 8 Vict. c. 32, s. 14.

[4] 33 & 34 Vict. c. 10, s. 9.

MONEYLENDERS.

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SECTION 1.—INTRODUCTION.

157. Contracts whereby money "is lent for the like in kind again . . . with hire for the use thereof"[1] have always been regarded in Scots law as distinct from loan, because the latter is gratuitous. In Scotland, the Canon law prohibiting the taking of interest on money has not been perpetuated, nor have the restraints anciently imposed among Jews and by the Roman law been incorporated into our jurisprudence. Nevertheless, the amount of the hire sought to be exacted was often so excessive that in order to repress the exorbitance of usurers the rate of interest was from time to time regulated by statutes.[2] These statutes, known as "the usury laws," are no longer in force,[3] but the policy which led to their enactment for protection of the inexperienced and needy gave rise to four recent acts regulating transactions with moneylenders, viz. the Betting and Loans (Infants) Act, 1892;[4] the Moneylenders Acts, 1900,[5] 1911,[6] and 1927.[7] As the Moneylenders Act, 1911, has been wholly repealed by the Act of 1927,[8] the statutory code anent moneylending consists of the extant portion of the Act of 1900 and the whole Act of 1927, and is cited as the Moneylenders Acts, 1900 to 1927.[9]

SECTION 2.—REOPENING OF TRANSACTIONS.

158. By the Moneylenders Act, 1900,[10] which came into operation on 1st November 1900, it is provided[11] that where proceedings are taken in any Court by a moneylender for the recovery of any money lent after the commencement of the Act, or the enforcement of any agreement or security made or taken after the commencement of the Act, in respect of money lent, and evidence satisfies the Court that the interest or other charges are excessive and that the transaction is harsh and unconscionable, the Court may reopen the transaction, take an account between the moneylender and the person sued, create a new obligation notwithstanding any statement purporting to close previous dealings, reopen any account between the parties, and relieve the person sued from any payment exceeding the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges as the Court, having regard to the risk and all the circumstances, may adjudge reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it and may set aside, wholly or in part, or revise or alter any security given or agreement made in respect of money lent by the moneylender, and if the moneylender has parted with the security may order him to indemnify the borrower or other person sued. The provisions of the section apply to any transaction which, whatever its form may be, is substantially one of moneylending by a moneylender. They may be exercised although the moneylender's right of action for recovery of the money lent is barred.[1]

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[1] Stair, Inst. i. 15, 7; More's Notes, No. 2, vol. i. xcvi.; Ross, Lect. i. 4.

[2] 1587, c. 52; 1594, c. 222; 1597, c. 251; 1621, c. 28; 1633, c. 21; 1661, c. 49; 12 Anne, 1713, Stat. 2, c. 16; 5 & 6 Will. IV., 1835, c. 41 (see Hume, i. 505); 7 Will. IV. & 1 Vict. c. 80; 2 & 3 Vict. c. 37; 13 & 14 Vict. c. 56.

[3] 17 & 18 Vict. c. 90.

[4] 55 & 56 Vict. c. 4.

[5] 63 & 64 Vict. c. 51.

[6] 1 & 2 Geo. V. c. 38.

[7] 17 & 18 Geo. V. c. 21.

[8] But see proviso in 17 & 18 Geo. V. c. 21, s. 19 (3).

[9] 17 & 18 Geo. V. c. 21, s. 19 (1).

[10] 63 & 64 Vict. c. 51.

[11] *Ibid.*, s. 1 (1).

159. The Court may determine a contract and order the principal to be paid with such interest as the Court may allow.[2] On any application relating to the admission or amount of a proof by a moneylender in bankruptcy proceedings the Court may exercise its powers under the section. Rights of *bona fide* assignees or holders for value without notice are saved.[3] Orders in Council may be made relating to Courts to which proceedings on moneylenders' transactions are to be taken.[4]

SECTION 3.—ONUS OF PROOF.

160. If a borrower maintains that the interest charged is excessive and the transaction harsh and unconscionable, the burden of proof rests on him,[5] except where the rate of interest exceeds 48 per cent., in which case the Court shall, unless the contrary is proved, presume for the purposes of the section last mentioned that the interest charged is excessive and that the transaction is harsh and unconscionable.[6]

SECTION 4.—MEANING OF "HARSH AND UNCONSCIONABLE."

161. Few Scots decisions concerning the meaning of "harsh and unconscionable" have been officially reported. Cases in which the Court held transactions binding are undernoted.[7] Reference is also made to cases where transactions were found harsh and unconscionable.[1] A high rate of interest (not exceeding 48 per cent.) is not *per se* sufficient to warrant reopening of a transaction; other circumstances to be taken into consideration are, *e.g.*, the security (if any) offered, the amount and duration of the loan, and the debtor's capacity for and prospects in business.[2] Where in proceedings under s. 2 of the Betting and Loans (Infants) Act, 1892,[3] it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known of the infancy unless he proves that he had reasonable ground for believing the infant to be of full age.[4] Apart from statute, the Court will refuse to enforce a disgraceful demand.[5] Moreover, the rate of interest to be judicially awarded is within the judge's discretion; there is no statutory rate.[6]

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[1] 17 & 18 Geo. V. c. 21, s. 10 (5).

[2] *Ibid.*, s. 13 (1) (2).

[3] 63 & 64 Vict. c. 51, s. 1 (5).

[4] 17 & 18 Geo. V. c. 21, s. 19 (5) (*b*).

[5] *Wolfe* v. *Green* (O.H.), 1908, 15 S.L.T. 732.

[6] 17 & 18 Geo. V. c. 21, s. 10 (1).

[7] *Pall Mall Bank* v. *Philp's Tr.* (O.H.), 1904, 41 S.L.R. 621; 12 S.L.T. 139; *J. Davis & Sons* v. *M'Nally* (O.H.), 1904, 12 S.L.T. 234; *Midland Discount Co.* v. *Macdonald*, 1909 S.C. 477.

SECTION 5.—INTEREST.

162. A moneylender cannot now stipulate for compound interest, but may charge simple interest on arrears of principal or interest, at a rate not exceeding the rate payable in respect of the principal apart from default, and any interest so charged shall not be reckoned for the purposes of the Act of 1927 as part of the interest charged in respect of the loan.[7] Where interest is not expressed in terms of a rate, any amount payable to the moneylender (other than simple interest charged in accordance with the proviso to s. 7) shall be appropriated to principal and interest in the proportion that the principal bears to the total amount of the interest, and the rate per centum per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule shall be deemed to be the rate of interest charged on the loan.[8] Special provisions are made concerning the calculation in bankruptcy proceedings of interest on loan by a moneylender.[9] For particulars of proof of debt in bankruptcy, see s. 9 (2).

SECTION 6.—CHARGES FOR NEGOTIATIONS.

163. Any agreement between a moneylender and a borrower or intending borrower for payment to the moneylender by the other party of any sum on account of costs, charges, or expenses incidental to negotiations for the loan or proposed loan is declared illegal by the Act of 1927.[10]

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[1] *Gordon's Administrator* v. *Stephen* (O.H.), 1902, 9 S.L.T. 397; *Exchange Loan Co.* v. *Torrance* (O.H.), 1904, 41 S.L.R. 303; 11 S.L.T. 678; *Howard & Cope* v. *Leckie & Anr.* (O.H.), 1909, 2 S.L.T. 444; *Stirling* v. *Brown*, 1925, S.L.T. 413.

[2] *Midland Discount Co.* v. *Macdonald*, 1909 S.C. 477.

[3] 55 Vict. c. 44; *cf.* s. 3.

[4] 63 & 64 Vict. c. 51, s. 5.

[5] *Young* v. *Gordon*, 1896, 23 R. 419.

[6] *Ross* v. *Ross*, 1896, 23 R. 802, per Lord M'Laren at p. 806; *Grant* v. *Grant's Trs.*, 1898, 25 R. 948; *cf. Christie's Factor* v. *Hardie*, 1899, 1 F. 703.

[7] 17 & 18 Geo. V. c. 21, s. 7.

[8] *Ibid.*, s. 15 (2).

[9] *Ibid.*, s. 9 (1).

[10] *Ibid.*, s. 7.

SECTION 7.—TITLE TO SUE.

164. Proceedings for a transaction being reopened may be taken by the borrower or other person liable, notwithstanding that the time for repayment of the loan or any instalment thereof may not have arrived.[1] It has been held in this connection that a trustee in bankruptcy has a title to sue in virtue of his power under the Bankruptcy (Scotland) Act, 1913,[2] and he certainly has it under the Act of 1927.[3] A counter-claim by the borrower in proceedings raised by the lender has been held competent.[4]

SECTION 8.—DEFINITION OF "MONEYLENDER."

165. The expression "moneylender" in the Act of 1900 includes every person whose business is moneylending or who holds himself out as carrying on that business, except (*a*) a pawnbroker; (*b*) a society registered under the Friendly Societies Acts or similar Acts; (*c*) a body corporate, empowered by special Act to lend money; (*d*) *bona fide* bankers or insurers; and (*e*) any body corporate exempted by order of the Board of Trade.[5] In England it has been held that the question whether or not moneylending is carried on as a business is one of fact,[6] but that whether or not a person is a moneylender in the statutory sense is a question of law.[7]

SECTION 9.—TIME FOR TAKING PROCEEDINGS.

166. No proceedings shall lie for recovery by a moneylender of money lent by him after the commencement of the Act (1st January 1928) [8] or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of the Act in respect of any loan made by him, unless the proceedings are commenced within twelve months from the date on which the cause of action accrued.[9] This is subject to the proviso that if during the twelve months, or at any time within any subsequent period during which proceedings may by virtue of the proviso be brought, the debtor acknowledges in writing the amount due and gives a written undertaking to the moneylender to pay that amount, proceedings may be brought within twelve months from the date of the writing. The time for commencement of proceedings shall not begin to run in respect of payments from time to time becoming due until a cause of action accrues in respect of the last payment becoming due under the contract.[10] If when the cause of action accrues, or an acknowledgment and undertaking as aforesaid is given, the person entitled to take proceedings is *non compos mentis*, the time for commencement of proceedings shall not begin to run until that person ceases to be *non compos mentis* or dies, whichever first occurs.[1] If at the date last mentioned the debtor is beyond the seas, the time shall not begin to run until his return.[2]

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[1] 63 & 64 Vict. c. 51, s. 1 (2).

[2] 3 & 4 Geo. V. c. 20, s. 70 ; *Robertson* v. *Hurwitz*, 1924, S.L.T. (S.C.R.) 94.

[3] 17 & 18 Geo. V. c. 21, s. 10 (4).

[4] *Blumberg* v. *Shand Harvey* (O.H.), 1908, 16 S.L.T. 4.

[5] 63 & 64 Vict. c. 51, s. 6.

[6] *Litchfield* v. *Dreyfus*, [1906] 1 K.B. 584.

[7] *Abrahams* v. *Dimmock*, [1915] 1 K.B. 662.

[8] 17 & 18 Geo. V. c. 21, s. 19 (5).

[9] *Ibid.*, s. 13 (1).

[10] *Ibid.*, s. 13 (1) (*b*).

SECTION 10.—EXCISE LICENCE AND CERTIFICATE.

167. Every moneylender must hold an excise licence[3] which is granted only on production of a certificate disclosing the prescribed particulars.[4] Certificates are granted by the Licensing Court under the Licensing (Scotland) Acts.[5] The licence must be taken out in the true name of the licensee,[6] and the certificate shall shew his true name and the name under which and the address at which he is authorised to carry on business; and a certificate shall not authorise a moneylender to carry on business at more than one address, or under more than one name, or under any name which includes the word "bank" or otherwise implies that he is carrying on banking business.[7] No certificate shall authorise a moneylender to carry on business under any name except (*a*) his true name, or (*b*) the name of the firm in which he is a partner, not being a firm required by the Registration of Business Names Act, 1916, to be registered, or (*c*) a business name, whether of an individual or of a firm in which he is a partner, under which he or the firm had at the passing of the Act been registered for not less than three years both as a moneylender under the 1900 Act and under the Registration of Business Names Act, 1916.[7] A certificate shall come in force on the date specified therein and shall expire on the next following 31st day of July.[8]

168. A certificate shall not be refused except on some one or more of the following grounds:

(*a*) that satisfactory evidence has not been produced of the good character of the applicant, and in the case of a company of the persons responsible for the management thereof;

(*b*) that the applicant or person responsible for the management of the moneylending business is not a fit and proper person to hold a certificate;

(*c*) that the applicant or person responsible for management is by order of the Court disqualified for holding a certificate;

(*d*) that the rules for application have not been complied with.[9]

An appeal against refusal of a licence lies to the Licensing Appeal Court.[10]

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[1] 17 & 18 Geo. V. c. 21, s. 13 (1) (*c*).

[2] *Ibid.*, s. 13 (1) (*d*). See 19 & 20 Vict. c. 97, s. 11, *re* joint debtors.

[3] 17 & 18 Geo. V. c. 21, s. 1.

[4] *Ibid.*, s. 18 (*a*). For regulations anent applications for certificates under the Act, see Statutory Rules and Orders, dated 21st September 1927, No. 882 S. 52.

[5] 17 & 18 Geo. V. c. 21, s. 4.

[6] *Ibid.*, s. 5, and First Schedule.

[7] *Ibid.*, s. 2 (3).

[8] *Ibid.*, s. 2 (4).

[9] *Ibid.*, s. 2 (6).

[10] *Ibid.*, ss. 2 (7) and 18 (*a*).

169. A certificate held by a person or by any partner in his firm may be suspended or forfeited on conviction of any offence under the Moneylenders Acts or ss. 2 and 4 of the Betting and Loans (Infants) Act, 1892; and the Court may declare any such person, or any person responsible for carrying on the business, to be disqualified from obtaining a certificate for such time as the Court thinks fit.[1] Every such conviction and order shall be endorsed on the certificate held by the person convicted or by any other person affected by the order, and particulars sent to the licensing authority and to the Commissioners of Customs and Excise.[2]

SECTION 11.—MODE OF CARRYING ON BUSINESS.

170. Moneylenders must state their authorised names on documents issued by them and must not issue documents implying that they carry on banking business.[3] A moneylender must not knowingly, except in response to written request, send circulars or other documents inviting borrowing, nor do so by canvassing, or by advertisements in a newspaper, or by poster or placard. But he may advertise in a newspaper, or by poster or placard exhibited at his authorised address, his authorised name and address, telegraphic address, telephone number, any address at which he formerly carried on business, a statement that he lends money with or without security and of the highest and lowest sums he is prepared to lend, and the date on which his business was first established.[4] Any document issued by a moneylender which purports to indicate the terms of interest must shew the rate per centum in accordance with the Act.[5]

171. A moneylending contract, to be enforceable, must be in writing and signed personally by the borrower, and a copy of the contract must be sent to the borrower within seven days.[6] The memorandum of the contract must contain all the terms of the contract, including the date of the loan, the amount of principal, and the rate of interest expressed either as a rate per cent. per annum or as a rate calculated in accordance with the First Schedule to the 1927 Act.[7] On reasonable written demand and tender of one shilling a moneylender must during the subsistence of the contract supply a statement (and on tender of a reasonable sum for expenses a copy of any document relating to the loan or any security therefor) to the borrower or his nominee. The statement must be signed by the moneylender or his agent and must shew the following particulars: (1) the date; (2) the amount of principal; (3) the rate of interest; (4) the amount repaid and the date of repayment; (5) the amount due and unpaid, the date on which it became due and the interest due and unpaid on every such sum, and (6) the amount not yet due which remains outstanding and the date on which it will become due. Default in supplying such a statement is a bar to the moneylender suing for or recovering any sum under the contract, and interest is not chargeable in respect of the period of default.[1]

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[1] 17 & 18 Geo. c. 21, s. 3 (1) (*a*).

[2] *Ibid.*, s. 3 (1) (*b*).

[3] *Ibid.*, s. 4 (2).

[4] *Ibid.*, s. 5 (1) (2) (3).

[5] *Ibid.*, s. 5 (4), and First Schedule.

[6] *Ibid.*, s. 6 (1).

[7] *Ibid.*, s. 6 (2).

SECTION 12.—PAWNBROKERS.

172. The provisions of the 1927 Act with regard to the form of the contract, the prohibition of charges for expenses, and the limitation of time for taking proceedings do not apply to loans by pawnbrokers, even although the loan is not made in the course of the business of the pawnbroker carried on in accordance with the Pawnbroking Acts. But the pawnbroker must, in order to his exemption from these sections, comply with the following conditions: (*a*) he must deliver or send to the pawner within seven days a memorandum of the contract shewing the date of the loan, the interest charged expressed in terms of a rate per cent. per annum, and any other charges payable. The rate of interest must not exceed 20 per cent. (*b*) No charge must be made for expenses of negotiations except a charge of one shilling for the preparation of documents and any stamp duty paid by the pawnbroker on the documents. A pawnbroker may make reasonable charges for storage of pledges above a certain size and weight, and for interest upon storage paid by him.

SECTION 13.—ASSIGNMENT OF MONEYLENDERS' DEBTS.

173. Where any debt in respect of money lent by a moneylender, whether before or after the commencement of the 1927 Act, or in respect of interest on any such debt or the benefit of any agreement made or security taken in respect of any such debt or interest, is assigned to any assignee, the assignor (whether he is the moneylender by whom the money was lent or any person to whom the debt has been previously assigned) shall, before the assignment is made, (*a*) give the assignee notice in writing that the debt, agreement, or security is affected by the operation of the Act, and (*b*) supply to the assignee all information necessary to enable him to comply with the provisions of the Act relating to the obligation to supply information as to the state of loans and copies of documents relating thereto. Any person acting in contravention of any of the provisions of this section is guilty of a misdemeanour and is liable to indemnify any other person who is prejudiced by the contravention.[2]

174. The provisions of the 1927 Act continue to apply as respects any debt to a moneylender for money lent by him after the commencement of the Act, or interest or the benefit of any agreement made or security taken, notwithstanding that the debt or the benefit of the agreement or security has been assigned. But the Act does not affect the validity of any agreement with or security taken by a moneylender as regards a *bona fide* assignee or holder for value without notice, or the validity of any payment or transfer of property made on the faith of the validity of the agreement or security to a person without notice of any defect. The time limit for proceedings under the Act does not apply to proceedings by a *bona fide* assignee or holder for value without notice. In all these cases the moneylender is liable to indemnify the borrower or other person prejudiced in virtue of the section. These provisions do not apply when the assignee or holder for value is himself a moneylender.[1]

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[1] 17 & 18 Geo. V. c. 21, s. 8.

[2] *Ibid.*, s. 16.

SECTION 14.—PROHIBITION OF SUMMARY DILIGENCE.

175. Summary execution or diligence is not competent upon any bill of exchange or promissory note or upon any bond or obligation registered in the books of any Court, where such bill, promissory note, bond, or obligation has been granted to or in favour of or is held by a moneylender.[2] Summary diligence means execution of diligence, not the obtaining of the summary warrant on which it proceeds.[3]

SECTION 15.—OFFENCES AND PENALTIES.

176. If any moneylender, or any manager, agent, or clerk of a moneylender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a moneylender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanour, and liable to imprisonment for two years with or without hard labour and to a fine of £500 or to both.[4]

177. Any person who (*a*) takes out a moneylender's excise licence in any name other than his true name; or (*b*) carries on business as a moneylender without a licence, or in any name other than his authorised name, or at any address other than his authorised address; or (*c*) enters into any moneylending agreement or security otherwise than under his authorised name, is guilty of an offence and is liable on a first conviction to an excise penalty of £100, and on a second or subsequent conviction to three months' imprisonment or (in the case of a company) an excise penalty of £500.[5]

178. A person who without reasonable cause fails to produce his certificate when requested by the Court for endorsement thereon of a conviction under the Act is liable on summary conviction to a penalty of £5 for each day during which the default continues.[6] A similar penalty is incurred by a moneylender who fails on written demand to supply a borrower or his nominee with the information required by the Act as to the state of the loan or with copies of documents relating thereto.[7]

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[1] 17 & 18 Geo. V. c. 21, s. 16.

[2] *Ibid.*, s. 18.

[3] *Murray* v. *M'Guire*, 1928 S.C. 647.

[4] 63 & 64 Vict. c. 51, s. 4.

[5] 17 & 18 Geo. V. c. 21, s. 1 (3) (1).

[6] *Ibid.*, s. 3 (2).

[7] *Ibid.*, s. 8 (3).

179. Contravention of the provisions of the Act requiring the authorised name of the moneylender to be shewn on documents issued by him involves liability to a fine on summary conviction of £20 in respect of each offence. A moneylender who publishes advertisements or circulars containing expressions which imply that he carries on a banking business is liable on summary conviction to a fine of £100, and on a second or subsequent conviction to imprisonment for three months or (in the case of a company) a fine of £500.[1]

180. A person who by circular, advertisement, or canvassing invites any person (*a*) to borrow money from a moneylender; (*b*) to enter into any transaction involving the borrowing of money from a moneylender; or (*c*) to apply to any place with a view to obtaining information or advice as to borrowing from a moneylender, is guilty of a misdemeanour and liable, on conviction on indictment, to imprisonment for three months or a fine of £100 or both, and on summary conviction to imprisonment for one month or a fine of £20 or both. The same penalties are involved in the failure, in a document issued or published by a moneylender, purporting to indicate the terms of interest upon which he is willing to lend, to express the interest charged in terms of a rate per cent. per annum or to shew the rate as provided by the 1927 Act.[2]

181. Failure to give notice to an assignee that a debt or security is affected by the Act, or to supply him with the information prescribed by the Act, is a misdemeanour, and any person guilty thereof is liable, on conviction on indictment, to imprisonment for two years or a fine of £500 or both, and on summary conviction to imprisonment for three months or a fine of £100.[3]

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[1] 17 & 18 Geo. V. c. 21, s. 4 (3).

[2] *Ibid.*, s. 5 (5).

[3] *Ibid.*, s. 16 (1).

MONTH.

See TIME, COMPUTATION OF.

MONUMENTS.

See ANCIENT MONUMENTS.

MORA

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Section 1.—Introduction.

182. *Mora*, or delay, is a general term, though not a good *nomen juris*,[1] applicable to excessive or unreasonable delay in asserting a known right or claim, or in performing an obligation or duty, coupled with a material alteration of circumstances to the detriment of the other party.[2] It was at one time frequently urged and held that by lapse of time alone, without any other circumstance, a pursuer might be barred from insisting in an otherwise unimpeachable claim.[3] It is now conclusively settled that mere delay has no legal result where it is not in breach of an express or implied condition of promptness, or where it does not come up to the appropriate statutory period of prescription or to the common law equivalent (in certain cases) of time immemorial.[4] But *mora* increases the burden of proof on those who have incurred the delay.[5]

Section 2.—Mora as Breach of Condition of Promptness.

183. *Mora* as a breach of an express or implied condition of promptness is illustrated mainly from cases of mercantile business which does not admit the lapse of a considerable time. The consequence of *mora* in the acceptance of an offer is that the offer itself, in the option of the offerer, becomes void.[6] But the delay must be the fault of the acceptor;

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[1] *Mackenzie* v. *Catton's Trs.*, 1877, 5 R. 313, per Lord Deas at p. 317.

[2] *Assets Co.* v. *Bain's Trs.*, 1904, 6 F. 692, per Lord Pres. Kinross at p. 705; *Lees' Trs.* v. *Dun*, 1912 S.C. 50, per Lord Salvesen at p. 62; affd. 1913 S.C. (H.L.) 12; *Kelly* v. *Peacock*, 1917, 55 S.L.R. 65.

[3] *Cullen* v. *Wemyss*, 1838, 1 D. 32, per Lord Glenlee; *Robson* v. *Bywater*, 1870, 8 M. 757; *Cook* v. *North British Rly. Co.*, 1872, 10 M. 513, per Lord Benholme at p. 516; *Douglas* v. *Murray*, 1797, 4 Pat. 4, per Lord Thurlow at p. 9.

[4] See Rankine, Personal Bar, ch. v., for full discussion of *Mora*.

[5] *Bosville* v. *Lord Macdonald*, 1910 S.C. 597, per Lord Pres. Dunedin at p. 608; *Bain's Trs.* v. *Assets Co.*, 1905, 7 F. (H.L.) 104; *Miller's Exrx.* v. *Miller's Trs.*, 1922 S.C. 150, per Lord Pres. Clyde at p. 155.

[6] Bell, Com. (7th ed.) i. 343; Bell's Prin., s. 79; *Allan* v. *Colzier*, 1664, Mor. 9428.

and so when an acceptance was posted at once, but not delivered in due course through the fault of the Post Office, the contract was held completed.[1] Failure to pay a debt at the time stipulated will render the debtor liable in damages, the measure of damages, in all but very exceptional cases, being the interest applicable to the period of non-payment.[2] Where special damages have been awarded this has been done on the express ground of breach of contract; and it seems incorrect therefore to cite such cases under the head of *mora*.[3] Failure to return at the stipulated time a subject deposited will render the depositary liable for the price, if the subject accidentally perish during the period of the delay.[4] Where goods are not conform to contract the buyer has a right of rejection, both at common law and by statute, but this right will be lost by unreasonable delay in intimating the rejection.[5] What is timeous rejection is a question of circumstances.[6]

184. By delay in giving entry a superior will lose his right to exact from the vassal dues of non-entry.[7] "In obligations for rent or stipend, payable in meal or corn, the debtor by incurring delay is liable to the highest prices that year, whereas otherwise the fiars or rates settled yearly by authority is the rule." [8]

185. A preference gained by arresting on the dependence of an action will be cut down by sequestration if there has been undue delay in following up the diligence.[9] A challenge to the method of citation in an action must be instant to be effectual.[10] A partner in a joint adventure must assert his right in reasonable time.[11] A creditor who unduly delays bringing an action will not be entitled to interest.[12]

SECTION 3.—MORA AS A PLEA IN LAW.

186. Since *mora* alone, apart from prescription or as a breach of a condition of promptness, is insufficient to bar a right of action, it is incorrect to put into the defender's pleas in law the word "mora" as a separate plea.[13] The correct expression of the plea is "the action is barred by *mora*, taciturnity, and acquiescence." This plea must be supported by averments of facts and circumstances inferring prejudice or acquiescence, and it is a plea to the merits and not a dilatory plea.[1]

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[1] *Higgins* v. *Wilson & Co.*, 1847, 9 D. 1407; affd. *sub nom. Dunlop* v. *Higgins*, 1848, 6 Bell's App., 195.

[2] Bankt. i. 473; Bell's Prin., s. 32; *Roissard* v. *Scott's Trs.*, 1897, 24 R. 861, per Lord Kincairney.

[3] *Mansfield* v. *Campbell*, 1836, 14 S. 585; *Little's Trs.* v. *Spankie*, 1830, 8 S. 418.

[4] Stair, i. 13, 2; Bankt. i. 472.

[5] Bell, Com. (7th ed.) i. 464; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (2).

[6] *Mechan & Sons* v. *Bow, M'Lachlan & Co.*, 1910 S.C. 758, per Lord Salvesen at p. 763.

[7] Ersk. ii. 45.

[8] Bankt. i. 472.

[9] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 10; *Mitchell* v. *Scott*, 1881, 8 R. 875; *Liqrs. of Benhar Coal Co., Ltd.*, v. *Turnbull*, 1883, 10 R. 558; Graham Stewart on Diligence, p. 180.

[10] *Central Motor Engineering Co.* v. *Galbraith*, 1918 S.C. 755, per Lord Pres. Strathclyde at p. 766.

[11] *Stewart* v. *North*, 1893, 20 R. 260, per Lord Pres. Robertson at p. 268.

[12] *Wick* v. *Wick*, 1898, 1 F. 199; but see *Miller's Exrx.* v. *Miller's Trs.*, 1922 S.C. 150.

[13] *Bain's Trs.* v. *Assets Co.*, 1905, 7 F. (H.L.) 104, per Lord Davey at p. 109.

SECTION 4.—MORA AND ACQUIESCENCE.

SUBSECTION 1.—*General Principles.*

187. The question whether the pursuer's acquiescence in the defender's operations has been made out is a question of fact to be determined by the jury (or the judge sitting as a jury).[2] Each case must be determined on its own circumstances, but certain general principles which have been held applicable to this doctrine require notice. (First) The facts and circumstances on which the plea is rested must be set out on record, must be sufficient to establish consent, and must admit of no other reasonable explanation, since acquiescence is nothing but implied consent.[3] Such facts may be definite actings of the pursuer, inconsistent with the claim he now makes;[4] or silence in the circumstances where consent is presumed from silence.[5] (Second) There must be full knowledge on the part of him whose claim is sought to be barred, both of his own rights and of the acts said to invade these.[6] There must be "actual," and not merely "imputed" knowledge, where consent is presumed from silence.[7] Knowledge by a representative or agent is the same as knowledge by the principal, and the bar so established transmits against singular successors.[8] The case of *Marquis of Abercorn* v. *Longmuir* [9] at first sight seems to conflict with one or both of these rules. The explanation appears to be that the law presumes on the part of everyone knowledge of his rights, provided he is aware of the facts out of which they arise.[10] (Third) In certain circumstances there is a presumption of consent which cannot be redargued by any proof to the contrary. Thus, where one in full knowledge of his rights and of the alleged infringement stands by and permits another, without remonstrance, to incur great expense for an object necessarily in contravention of such rights, he will be presumed to have consented to the operations, and will be barred from insisting on their removal.[1] (Fourth) Consent will also be presumed from the creditor's silence amid material change of circumstances. Thus where shareholders in a railway company asked the Court to interdict certain persons from acting as directors on the ground that their election was invalid, the Court held that the pursuers were barred from raising this question by having delayed proceedings for a month, during which the respondents had entered upon the duties of their office.[2]

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[1] *Assets Co.* v. *Bain's Trs.*, 1904, 6 F. 692, per Lord Pres. Kinross at p. 705, and Lord Young at p. 711; Maclaren, Court of Session Practice, p. 403.

[2] *Colvin* v. *Johnstone*, 1890, 18 R. 115; *Bicket* v. *Morris*, 1866, 4 M. (H.L.) 44, per Lord Cranworth at p. 51; *Lees' Trs.* v. *Dun*, 1912 S.C. 50, per Lord Salvesen at p. 66; *Mitchell* v. *Scott*, 1881, 8 R. 875. See Lord Trayner's opinion in *Assets Co.* v. *Bain's Trs.*, 1904, 6 F., at p. 739.

[3] *Cowan* v. *Lord Kinnaird*, 1865, 4 M. 236, per Lord Justice-Clerk Inglis at p. 241; *Moir* v. *Alloa Coal Co.*, 1849, 12 D. 77; *Hill* v. *Dixon*, 1850, 12 D. 808; *Brisbane's Trs.* v. *Lead*, 1828, 7 S. 69.

[4] *Steel Co. of Scotland* v. *Tancred, Arrol & Co.*, 1892, 19 R. 1062; *Ure* v. *M'Cubbin*, 1857, 19 D. 758; *Macintosh* v. *West Stirlingshire Turnpike Road Trs.*, 1849, 12 D. 85.

[5] *Lord Advocate* v. *Wemyss*, 1899, 2 F. (H.L.) 1, per Lord Watson at p. 17.

[6] *Bicket* v. *Morris*, 1866, 4 M. (H.L.) 44, per Lord Chan. Chelmsford at p. 49; *Hill* v. *Wood*, 1863, 1 M. 360, per Lord Justice-Clerk Inglis at p. 377; *Assets Co.* v. *Bain's Trs.*, 1904, 6 F. 692, per Lord Trayner at p. 740.

[7] *Lees' Trs.* v. *Dun*, 1912 S.C. 50, per Lord Salvesen at p. 66.

[8] *Viscount Melville* v. *Douglas's Trs.*, 1830, 8 S. 841; *Colville* v. *Middleton*, 27th May 1817, F.C.

[9] 20th May 1820, F.C.

[10] Rankine on Land Ownership, 4th ed., p. 395.

SUBSECTION (2).—*As affecting Rights of Property.*

188. The question whether acquiescence is an effective mode of transferring or fortifying rights in heritable property (as distinguished from minor rights, such as servitudes) has never been settled by authoritative decision. But an opinion in the negative has been expressed very strongly by Lord Balgray and Lord Gillies in *Viscount Melville* v. *Douglas's Trs.*,[3] and more guardedly by Lord Pres. Inglis in *M'Intyre* v. *Orr.*[4] There is only one case in which the contrary view was expressed,[5] and it is thought that it is not competent to acquire rights of property by the acquiescence of the owner alone.[6]

SUBSECTION (3).—*In Consistorial Causes.*

189. For *mora* and acquiescence as defences to actions of divorce, see DIVORCE.[7] The effect of the defence of *mora* in an action of declarator of nullity of marriage was finally settled in 1885, when it was decided that, while lapse of time increases the burden of proof laid on the pursuer, it constitutes no absolute bar.[8] This decision followed an earlier English decision.[9]

SUBSECTION (4).—*As between Landlord and Tenant.*

190. In questions between landlord and tenant delay in claiming damages may prejudice the defender by loss of evidence necessary for his defence, and will in such cases effectually bar the claim.[10]

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[1] Bell's Prin., s. 946; *Bicket* v. *Morris*, 1866, 4 M. (H.L.) 44, per Lord Chan. Chelmsford at p. 49; *Muirhead* v. *Glasgow Highland Society*, 1864, 2 M. 420; *Earl of Kinnoul* v. *Keir*, 18th January 1814, F.C.; *Aytoun* v. *Melville*, 19th May 1801, F.C.; Mor. App. 1, "Property," No. 6; *M'Intyre* v. *Orr*, 1868, 41 Sc. Jur. 112, per Lord Deas at p. 117.

[2] *Blackburn* v. *Finlay*, 1848, 10 D. 590; see also *City of Glasgow Bank* v. *Mackinnon*, 1882, 9 R. 535.

[3] 1830, 8 S. 841.

[4] 1868, 41 Sc. Jur. 112, at p. 115; see also *Sim* v. *Stewart*, 1827, 5 S. 841 (N.E. 780), Lord Cringletie at p. 842 (N.E. 781).

[5] *Aytoun* v. *Melville*, 19th May 1801, F.C.; Mor. App. 1, "Property," No. 6.

[6] Rankine on Land Ownership, 4th ed., p. 397.

[7] Vol. VI, p. 6, *ante*.

[8] *C. B.* v. *A. B.*, 1885, 12 R. (H.L.) 36.

[9] *Castleden* v. *Castleden*, 1861, 9 H.L.C. 186.

[10] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 858; *Johnstone* v. *Hughan*, 1894, 21 R. 777; *Emslie* v. *Young's Trs.*, 1894, 21 R. 710; *Stewart* v. *Campbell*, 1889, 16 R. 346; *Broadwood* v. *Hunter*, 1855, 17 D. 340; *Grieve* v. *Rutherford's Trs.*, 1871, 9 S.L.R. 60; *Hamilton* v. *Duke of Montrose*, 1906, 8 F. 1026, per Lord Low at p. 1037.

SUBSECTION (5).—*In Actions for Slander.*

191. Actions for slander raised after a long lapse of time are always looked upon unfavourably by the Court,[1] but in some cases a trial has been allowed.[2]

SUBSECTION (6).—*In Criminal Appeals.*

192. A bill of suspension must be brought within a reasonable time; otherwise the complainer will be held to have acquiesced in his conviction, and his right of review will be barred.[3]

SUBSECTION (7).—*In Other Matters.*

193. The effect is elsewhere discussed of delay in presenting cheques,[4] in presenting bills of exchange, or giving notice of dishonour,[5] and in calling a summons or petition.[6]

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[1] *Young* v. *Young*, 1903, 5 F. 330, per Lord M'Laren at p. 331; *Winn* v. *Quillan*, 1899, 2 F. 322, per Lord Justice-Clerk Macdonald at p. 324.

[2] *Cassidy* v. *Connochie*, 1907 S.C. 1112; *Cunningham* v. *Skinner*, 1902, 4 F. 1124.

[3] *Kelly* v. *Smith*, 1904, 7 F. (J.) 14; *M'Farlan* v. *Fishmongers of London*, 1904, 6 F. (J.) 60; *Allan* v. *Lamb*, 1900, 3 F. (J.) 15; *Montgomery* v. *Gray*, 1915 S.C. (J.) 94; *Carson* v. *Macpherson*, 1917 S.C. (J.) 36; *Low* v. *Rankine*, 1917 S.C. (J.) 39.

[4] See BANK, Vol. II. p. 65, *ante*.

[5] See BILLS OF EXCHANGE, Vol. II. p. 227, *ante*.

[6] See PRACTICE AND PROCEDURE.

MORAL IMBECILES.

See INSANITY AND LUNACY.

MORPHINE.

See MEDICINE AND PHARMACY.

MOTION ROLL.

MOTIONS.

See COURT OF SESSION; PRACTICE AND PROCEDURE.

MOTOR CARS.

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SECTION 1.—INTRODUCTORY.

194. When motor cars were introduced into this country the law at first was content to treat them as "locomotives on highways," and to make regulations for them accordingly. As time passed the number of motor cars greatly increased and their use became general. The term "motor car" was then introduced into the law, and statutes, accompanied by numbers of statutory rules and orders, were passed dealing specifically with the motor car. The development of road transport to the stage at which the use of the motor car has become universal has been accompanied by a corresponding development of statutes and statutory rules and orders, with the result that the law of motor cars is to-day contained in a mass of statutory and departmental enactments. Many of these, hardly intelligible in themselves, are rendered still more obscure by the lavish use of cross-reference and by piecemeal amendment.

195. What may still be described as the principal Act is the Motor Car Act of 1903.[1] This Act was passed nominally as "an Act to Amend the Locomotives on Highways Act, 1896,"[2] and was intended to be a temporary one. After being kept in force from year to year, however, by the annual Expiring Acts continuance statutes, the Act was made permanent by the Expiring Laws Act, 1922, First Schedule, Part III. The most important amending Act is the Roads Act, 1920.[3] The principal Orders made in consequence of the 1903 Act are the Motor Cars (Use and Construction) (Scotland) Order, 1904, dated 30th March 1904;[4] the Heavy Motor Car (Scotland) Order, 1905, dated 3rd January 1905;[5] the Heavy Motor Car (Amendment) Order, 1927, dated 29th July

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[1] 3 Edw. VII. c. 36.

[2] 59 & 60 Vict. c. 36.

[3] 11 & 12 Geo. V. c. 72.

[4] S.R. & O. 1904, No. 609/S. 3.

[5] S.R. & O. 1905, No. 1/S. 1.

1927;[1] and the Heavy Motor Car (Amendment) Order, 1928, dated 9th August 1928.[2] The power to make regulations with respect to the use of motor cars which was originally bestowed on the Secretary for Scotland by ss. 6 and 10 of the 1896 Act, is now entrusted to the Minister of Transport as regards both England and Scotland.[3] Regulations purporting to be made in pursuance of s. 6 of the 1896 Act must be laid before both Houses of Parliament, but such presentation to Parliament is not a condition precedent of the regulations coming into force.[4]

SECTION 2.—DEFINITIONS.

196. Under the 1903 Act "motor car" has the same meaning as the expression "light locomotive" under the 1896 Act, except that, for purposes of registration, the expression does not include a vehicle drawn by a motor car.[5] By s. 1 of the 1896 Act a "light locomotive" is "any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle, with its locomotive, not to exceed in weight unladen four tons), and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause." The "weight unladen" of any vehicle is "the weight of the vehicle inclusive of the body and all parts (the heavier being taken where alternative bodies or parts are used) which are necessary to or ordinarily used with the vehicle when working on a road, but exclusive of the weight of water, fuel, or accumulators (other than boilers) used for the purpose of propulsion and of loose tools or loose equipment."[6] A "heavy motor car" is defined as being "a motor car exceeding two tons in weight unladen."[7] A heavy motor car may be used on a highway if its weight unladen does not exceed 7¼ tons, or if its weight unladen with the weight of an unladen vehicle drawn by it does not exceed 9¾ tons.[8]

SECTION 3.—USE AND CONSTRUCTION.

SUBSECTION (1).—*Method of Warning.*

197. Every light locomotive shall carry a bell or other instrument capable of giving audible and sufficient warning of the approach or position of the carriage.[9] The person driving or in charge of the car shall, whenever necessary, give such audible and sufficient warning.[10]

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[1] S.R. & O. 1927, No. 700.

[2] S.R. & O. 1928, No. 614.

[3] Ministry of Transport Act, 1919 (9 & 10 Geo. V. c. 50), and Ministry of Transport (Secretary for Scotland Transfer and Exception of Powers) Order, S.R. & O. 1920, No. 2212/S. 110.

[4] *Hepburn* v. *Wilson*, 1901, 4 F. (J.) 18; 3 Adam 502.

[5] Sec. 20.

[6] The Roads Act, 1920, s. 7 (5).

[7] Order of 1905, Article II.

[8] Order of 1905, Article III., as amended by the Heavy Motor Car (Amendment) Order, 1921, Article I.

[9] 1896 Act, s. 3.

[10] The Motor Cars (Use and Construction) (Scotland) Order, 1904, Article IV. (5).

SUBSECTION (2).—*Conditions of Use.*

198. No motor car may be used on the highway unless the following (among other) conditions are satisfied:—

(1) The motor car, if it exceeds in weight unladen 7 hundredweight, shall be capable of being so worked that it may travel either forwards or backwards.[1]

(2) The motor car shall not exceed 7 feet 2 inches in width between its extreme projecting points.[2]

(3) The motor car shall have two independent brakes in good working order.[3]

(4) The motor car and all its fittings shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the car or on any highway.[4]

199. Every person driving or in charge of a motor car on the highway must comply with the following (among other) regulations:—

(1) He shall not cause the car to travel backwards for a greater distance or time than may be requisite for the safety or convenience of the occupants of the car and of the passenger and other traffic on the highway.[5]

(2) He must have control over the motor car, be able to obtain a full view from it of the road and of other traffic, only leave it if he has taken due precautions against its being started in his absence, and not allow it to stand on the highway so as to cause any unnecessary obstruction.[6] This provision does not displace the similar provisions of the Burgh Police Act, 1892,[7] and a charge in regard to these matters may accordingly be brought under that statute.[8]

(3) He must, when meeting any carriage, horse, or cattle, keep the car on the left or near side of the road, and when overtaking keep to the right or off side; the expression "carriage" does not include a tramcar or other vehicle running on fixed rails.[9]

(4) He must not interrupt the free passage of any person, etc., on the highway, and must keep his car on the left or near side of the road for the purpose of allowing such passage.[10]

(5) He must, on the request of any police constable in uniform or of any person in charge of a horse or cattle, or if such constable or person put up his hand as a signal for that purpose, stop his car and remain stationary as long as may be reasonably necessary.[11]

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[1] The Motor Cars (Use and Construction) (Scotland) Order, 1904, Article II. (1), as amended by the Motor Cars (Use and Construction) (Scotland) Order, 1911.

[2] Order 1904, Article II. (2).

[3] Article II. (4).

[4] Article II. (6).

[5] Order 1904, Article IV. (1).

[6] Article IV. (2).

[7] 55 & 56 Vict. c. 55, s. 381 (10).

[8] *Watson* v. *Ross*, 1920 J.C. 27.

[9] Article IV. (3), as amended by the Motor Cars (Use and Construction) (Scotland) Order, 1909.

[10] Article IV. (4).

[11] Article IV. (6).

Subsection (3).—*Roads Forbidden.*

200. The Minister of Transport may, on an application by a county council, after holding a public enquiry, prohibit or restrict the driving of vehicles of any specified class on any specified highway within the council area, where it appears to him that the use of such vehicles would be dangerous or unsuitable.[1] Provision is made by statute for the form which the "public enquiry" should take.[2]

Subsection (4).—*Noise.*

201. Every person driving or in charge of a motor car must use a silencer or other contrivance suitable and sufficient for reducing as far as may reasonably be practicable the noise of exhaust gases.[3] Every motor car shall be so constructed that when it is stationary, otherwise than owing to an enforced traffic stoppage, the driver can stop the action of any of its machinery so far as may be necessary for the prevention of noise.[4] No person may use on the highway any motor car which causes any excessive noise either directly or indirectly as a result of any defect or lack of repair in the car, or as a result of faulty packing or load adjustment.[5] When a motor car is stationary on any highway no person may use, in connection therewith, any instrument provided for the purpose of giving audible warning, except when such use is necessary on grounds of safety.[6]

Subsection (5).—*Lighting.*

202. Every vehicle on any road must, during the hours of darkness, carry (*a*) two lamps, each shewing to the front a white light visible from a reasonable distance; and (*b*) one lamp shewing to the rear a red light visible from a reasonable distance. Such lamps shall, during such hours, be lighted and in efficient condition.[7] The Minister of Transport is empowered to make regulations governing the use of such lamps, and may add to or vary the requirements of the Act.[8] The "hours of darkness" means (*a*) during summer time, the time between one hour after sunset and one hour before sunrise; (*b*) during the rest of the year, the time between half an hour after sunset and half an hour before sunrise.[9] Unless otherwise provided by the Minister by regulations, no light shewn by a motor car, other than a dipping head-light, may be moved by swivelling, deflecting, or otherwise while the car is in motion.[10] Penalties are provided for a breach of the Act or the regulations; a fine not exceeding £5 for a first offence, a fine not exceeding £20 for a second or subsequent offence.[1] In prosecutions for failure to shew the prescribed lights it is sufficient for a conviction to prove that a lamp was not burning; that fact *per se* renders the accused person guilty. It is no defence that the accused did not mean to contravene the order, had shewn no negligence, and did not know that his lamp, which had been lighted, had been blown out.[2]

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[1] The Roads Act, 1920, s. 7 (4), repealing s. 8 of the Motor Car Act, 1903.

[2] The Roads Act, 1920, Schedule II.

[3] Order 1904, Article IV. (7), as amended by the Motor Cars (Use and Construction) (Scotland) Order (No. 2), 1912.

[4] Order 1904, Article V.

[5] The Motor Cars (Excessive Noise) Regulations, 1929, dated 3rd June 1929, Article 2.

[6] *Ibid.*, Article 3.

[7] The Road Transport Lighting Act, 1927 (17 & 18 Geo. V. c. 37), s. 1.

[8] Sec. 1 (2) and (3).

[9] Sec. 1 (4).

[10] Sec. 4.

203. Regulations have been made in exercise of the power conferred on the Minister of Transport by the Road Transport Lighting Act, 1927. These are the Road Vehicles Lighting Regulations, 1928, dated 19th April 1928.[3] No part of the vehicle or its equipment may extend laterally more than 12 inches beyond the centre of a front lamp.[4] The front lamps must be fixed on opposite sides of the vehicle, and be as nearly as possible of the same power and fixed at the same height from the ground.[5] A motor car may carry two front lamps so fitted that the beam of light emitted by them is moved in conformity with the front wheels of the car when they are turned in steering, provided that (*a*) such lamps are in addition to the obligatory front lamps; (*b*) the angle through which the beam of light is moved shall not exceed the angle through which the front wheel, on the side towards which the car is being steered, is turned for the purpose of steering; (*c*) the centre of any such lamp shall not be more than 3 feet 3 inches above the ground.[6]

Subsection (6).—*Heavy Motor Cars.*

204. The principal regulations as to the conditions of use and construction of heavy motor cars are contained in the Heavy Motor Car (Scotland) Order, 1905, dated 3rd January 1905;[7] the Heavy Motor Car (Amendment) Order, 1927, dated 29th July 1927;[8] and the Heavy Motor Car (Amendment) Order, 1928, dated 9th August 1928.[9] These provisions prescribe the weight,[10] speed,[11] and overhang [12] of these vehicles, and limit their use on bridges.[13] A heavy motor car, if its weight unladen is 3 tons or more, may be of a width not exceeding 7 feet 6 inches, measured between its extreme projecting points.[14] No person may drive a heavy motor car on the highway or cause it to be there used unless a suitable reflecting mirror is so affixed to it as to enable its driver to be aware of the presence in rear of any other vehicle whose driver wishes to pass the heavy motor car.[15]

Subsection (7).—*Penalties.*

205. With regard to all the regulations contained in the Motor Cars (Use and Construction) (Scotland) Order, 1904, and in the Heavy

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[1] Sec. 10.
[2] *Howman* v. *Russell*, 1923 J.C. 32.
[3] S.R. & O. 1928, No. 286.
[4] Regulations 1928, 2 (1) (*a*).
[5] Regulations, 2 (2).
[6] Regulations, 5.
[7] S.R. & O. 1905, No. 1/S. 1.
[8] S.R. & O. 1927, No. 700.
[9] S.R. & O. 1928, No. 614.
[10] 1905 Order, Article III., Article V., Article XII., and 1927 Order, Article II.
[11] 1928 Order, Article VII.
[12] 1927 Order, Article II.
[13] 1905 Order, Article XIV.
[14] 1905 Order, Article IX.
[15] 1928 Order, Article VIIa.

Motor Car (Scotland) Order, 1905, it should be noted that they are made under the provisions of the Locomotives on Highways Act of 1896, and that a breach of any of them may, on summary conviction, be punished by a fine not exceeding £10.[1]

SECTION 4.—REGISTRATION AND LICENSING.

206. Every motor car must be registered and licensed for use, and its owner is liable to pay duty therefor on a scale and in the manner prescribed by the provisions of the Finance Act, 1920,[2] as amended by the Finance Acts of the following years; the Roads Act, 1920;[3] the Road Vehicles (Registration and Licensing) Order, 1921, dated 7th February 1921;[4] and the Road Vehicles (Registration and Licensing) Regulations, 1924, dated 23rd December 1924,[5] all as repeatedly amended in the following years. The licensing authority is in all cases the "county council," which for the purposes of application to Scotland includes the council of a royal, parliamentary, or police burgh containing a population of not less than 50,000.[6]

207. The duties charged upon motor cars are paid annually upon licences to be taken out by the persons keeping the vehicles.[7] They are payable on all kinds of motor cars except fire-engines, vehicles kept by a local authority while they are used for the purpose of their fire-brigade service, ambulances, road-rollers,[8] vehicles used exclusively on roads which are not repairable at the public expense,[9] and vehicles used solely for the haulage of lifeboats and their necessary gear.[10]

208. The amount of the duties is set forth in the Second Schedule to the Finance Act of 1920 as amended. As these are liable to vary with the incidence of taxation it is unnecessary to set them forth in full here. For the purposes of classification the vehicles taxable are divided into (1) cycles; (2) vehicles adapted and used for invalids; (3) hackney carriages, which are taxed according to their seating capacity, and tramcars; (4) locomotive ploughing engines, tractors, and other agricultural engines; (5) vehicles used for the conveyance of goods or burden of any description, whether in the course of trade[11] or otherwise; and (6) any other vehicles. The duties on the first five classes of vehicles are varying amounts fixed generally in accordance with the size and capacity of the vehicle in question; on the sixth class the duty is assessed on the vehicle's horse-power—*e.g.* on vehicles not exceeding 6 horse-power or electrically propelled the duty is £6, on vehicles exceeding 6 horse-power the duty is £1 for each unit or part of a unit of horse-power. The unit of horse-power falls to be calculated in accordance with regulations made by the Minister of Transport,[1] and the method of calculation is set forth in Article 37 of the Road Vehicles (Registration and Licensing) Regulations, 1924.

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[1] 59 & 60 Vict. c. 36, s. 7.

[2] 10 & 11 Geo. V. c. 18, s. 13 and Second Schedule.

[3] 10 & 11 Geo. V. c. 72.

[4] S.R. & O. 1921, No. 221.

[5] S.R. & O. 1924, No. 1462.

[6] Roads Act, s. 1 (1) and s. 18 (*b*).

[7] Finance Act, 1920, s. 13 (2).

[8] Finance Act, 1920, s. 13 (4).

[9] Finance Act, 1924 (14 & 15 Geo. V. c. 21), s. 18 (3).

[10] Finance Act, 1927 (17 & 18 Geo. V. c. 10), s. 11 (2).

[11] As to the considerations determining whether a motor car is used solely in connection with trade, see *Lithgow* v. *Foster*, 1924 J.C. 7.

209. Every person who applies for a licence under s. 13 of the Finance Act, 1920, makes a declaration in which he furnishes prescribed particulars with respect to the vehicle for which the licence is taken out.[2] It is an offence under the Act to use a vehicle for which no licence has been taken out, and an employee as well as the owner may relevantly be charged with the offence of "using" a motor car for which no licence is in force.[3] The county council, on issuing the licence, registers the vehicle and assigns to it a separate number. A mark indicating the registered number of the vehicle and the council with which it is registered must be fixed on the vehicle in a manner prescribed.[4] If the mark is not so fixed, or if it is in any way obscured or not easily distinguishable, the person driving the vehicle is liable, on summary conviction, to a fine not exceeding £20 for the first offence, and to a fine not exceeding £50 for any subsequent offence.[5]

210. Detailed regulations prescribing the licensing and registration of mechanically propelled vehicles are set forth in Part I. of the Road Vehicles (Registration and Licensing) Regulations, 1924. These comprise the method and form of application,[6] the form of licences and the way in which these must be displayed on the vehicles,[7] and the procedure to be followed on sale or transference of the vehicle.[8] An index mark is allotted to each council, being the letter or letters shewn opposite to the name of each council in the Third Schedule to the Regulations.[9] The size and form of the identification mark are prescribed,[10] and also the way in which it must be exhibited on the vehicle;[11] while provision is made for its illumination during the hours of darkness as defined by the Road Transport Lighting Act, 1927, s. 1 (4).[12]

211. Part II. of the Regulations, 1924, makes provision for trade licences; Part III. for hackney carriages; and Part IV. for vehicles exempt from licence duty.

Section 5.—Licensing of Drivers.

212. A person may not drive a motor car on a public highway unless he is licensed for the purpose, and a person may not employ anyone to drive a motor car who is not so licensed. If anyone acts in contravention of this provision he is guilty of an offence under the Act.[13] The county or burgh council grant a licence to drive a motor car to any person applying for it who resides in the county or burgh on payment of a fee of 5s., unless the applicant is disqualified as stated below.[1] The licence remains in force for twelve months from its date, and is renewable on the same conditions.[2] The licence must be produced by any person driving a car when demanded by a police constable, under a penalty, on summary conviction, of a fine not exceeding £5.[3] Any person under the age of seventeen years is disqualified for obtaining a licence (a motor-bicycle licence may be granted to any person over the age of fourteen years), and any person who holds a licence is disqualified for obtaining another licence while the first licence is in force.[4] No test of any kind is, however, imposed on applicants for a licence, provided the conditions mentioned above are fulfilled.

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[1] Finance Act, 1920, s. 13 (3).

[2] Roads Act, 1920, s. 5 (1).

[3] *Cockburn* v. *Gordon*, 1928 J.C. 87.

[4] Roads Act, s. 6 (1).

[5] *Ibid.*, s. 6 (2).

[6] Article 2.

[7] Article 4.

[8] Article 9.

[9] Article 21.

[10] Article 22.

[11] Article 23.

[12] Article 26, as amended by the Road Vehicles (Registration and Licensing) Amendment Regulations, 1928.

[13] Motor Car Act, 1903, s. 3 (1).

213. Any Court before whom a person is convicted of an offence under the 1903 Act or of any offence in connection with the driving of a motor car, other than a first or second offence, consisting solely of exceeding any limit of speed fixed under the Act, may, if the accused holds a licence, suspend the licence for such time as the Court thinks fit, and also declare him disqualified for holding a licence for such further time as the Court thinks fit, or, if he does not hold a licence, declare him disqualified for such time as the Court thinks fit for holding a licence; and if the person convicted holds a licence, the Court may cause particulars of the conviction and of any order of the Court to be endorsed upon the licence, and may, where any particulars are so endorsed, cause a copy of them to be sent to the council which granted the licence.[5] While the licence is suspended it is of no effect, and the person who held it is barred, under penalty, from applying for or obtaining another.[6] A person so disqualified may appeal against the Court's order in the same manner as a person may appeal who is ordered to be imprisoned without the option of a fine, *i.e.* to the Sheriff-Depute, the appeal being taken within seven days and disposed of summarily.[7]

SECTION 6.—RECKLESS AND NEGLIGENT DRIVING.

214. If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, he is guilty of an offence.[8] To warrant the conviction of a person so accused the recklessness or negligence with which he is charged need not be flagrant, wilful, or morally blameworthy.[9] The words of the Act are "recklessly or negligently," but while it is open to the prosecutor to select one or other of these wrongous ways of driving or to charge both cumulatively, he cannot insert them disjunctively in a complaint and charge the accused generally with driving in one or other of these wrongous ways. Thus, when an accused person was charged with driving "recklessly or negligently," a finding of "guilty as libelled" was held bad.[1] To constitute a good charge under this provision of the Act it is not necessary to have any specification of the *modus* other than "negligently."[2] It has been laid down, however, that public prosecutors, out of fairness to the accused, should consider the advisability of specifying the particular kind of negligence on which they rely.[3]

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[1] Motor Car Act, 1903, s. 3 (2).
[2] *Ibid.*, s. 3 (3).
[3] *Ibid.*, s. 3 (4).
[4] *Ibid.*, s. 3 (5).
[5] *Ibid.*, s. 4 (1), as amended by the Roads Act, 1920, s. 7 (2).
[6] Act 1903, s. 4 (3) and (5).
[7] Secs. 4 (4) and 18 (6).
[8] 1903 Act, s. 1 (1).
[9] *Waugh* v. *Campbell*, 1920 J.C. 1.

215. If, on committing such an offence, the driver of a car refuses to give his name and address or produce his licence, or if the motor car does not bear the mark or marks of identification, may be apprehended without a warrant by a police constable.[4] If a driver who commits the offence of driving recklessly, etc., refuses to give his name or address, he is guilty of an offence under the Act; and the owner of the car must, if required, give any information within his power which may lead to the identification and apprehension of the driver, and if the owner fails to do so, he also is guilty of an offence under the Act.[5]

216. A person guilty of an offence under the Act for which no special penalty is provided is liable on summary conviction in respect of each offence to a fine not exceeding £20, or in the case of a second or subsequent conviction to a fine not exceeding £50, or in the discretion of the Court to imprisonment for a period not exceeding three months.[6] A burgh magistrate has no jurisdiction to try offences under the Act,[7] and the right of appeal against any conviction involving a fine of over 20s.[8] does not extend to Scotland, the only right of appeal there being to the Sheriff-Depute against convictions followed by imprisonment without the option of a fine or by a fine exceeding £10.[9]

SECTION 7.—DUTY TO STOP IN CASE OF ACCIDENT.

217. A person driving a motor car must in any case, if any accident occurs to any person, whether on foot, on horseback, or in a vehicle, or to any horse or vehicle in charge of any person, owing to the presence of the motor car on the roads, stop, and if required give his own name and address, those of the owner, and the registration marks or number of the car. If he knowingly fails to do so he is liable, on summary conviction, for a first offence to a fine not exceeding £10; for a second offence to a fine not exceeding £20; and for any subsequent offence to a fine not exceeding £20, or in the discretion of the Court to a term of imprisonment not exceeding one month.[10]

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[1] *Connell* v. *Mitchell*, 1913 S.C. (J.) 13; 7 Adam 23.

[2] *Todrick* v. *Dennelar*, 1904, 7 F. (J.) 8; 4 Adam 456.

[3] *Dunn* v. *Mitchell*, 1911 S.C. (J.) 46; 6 Adam 365.

[4] Sec. 1 (2).

[5] Sec. 1 (3).

[6] Sec. 11 (1).

[7] *Macpherson* v. *Boyd*, 1907 S.C. (J.) 42; 5 Adam 247.

[8] Sec. 11 (2).

[9] Sec. 18 (6); *Bell* v. *Mitchell*, 1905, 8 F. (J.) 15; 4 Adam 661.

[10] 1903 Act, s. 6.

SECTION 8.—SPEED.

218. A person shall not, under any circumstances, drive a motor car on a public highway at a speed exceeding twenty miles per hour, and within any limits or place referred to in regulations made by the Minister of Transport with a view to the safety of the public, on the application of the local authority, a person shall not drive a motor car at a speed exceeding ten miles per hour.[1] For the necessary specification of such "limits or place" in complaints under this section, see the decisions cited below.[2] The "local authority" within the meaning of this provision is the road authority of any county or of any royal, parliamentary, or police burgh.[3]

219. The penalty for a first offence in regard to speed is, on summary conviction, a fine not exceeding £10; for a second offence, a fine not exceeding £20; and for any subsequent offence, a fine not exceeding £50; but a person shall not be convicted for exceeding the speed limit of twenty miles merely on the opinion of one witness as to the rate of speed.[4] The evidence of one policeman at the entrance to a "trap" and of one at the exit has been held to be enough,[5] but where two constables were outside the measured area of a "trap" and estimated the time of the motor car's entering the area, it was held that their evidence was not enough.[6] The evidence of two police officers who follow the motor car for a stated distance in a vehicle whose speedometer records a speed in excess of the limit is held to be sufficient for a conviction.[7]

220. Where a person is prosecuted for a speed offence, either he must be warned of the intended prosecution at the time of the offence or notice of the intended prosecution must be sent to him or to the owner of the car within a reasonable time, not exceeding twenty-one days.[8] Such notice should be in writing,[9] and the prosecutor must prove that notice was given to the accused.[10] Where there are special limits or places in which speed is restricted to ten miles per hour, it is the duty of the local authority to place notices in conspicuous places on or near the highway.[11]

221. The speed at which a heavy motor car which is not drawing a trailer may be driven on any highway shall not exceed (*a*) if all the wheels are fitted with pneumatic tyres, twenty miles per hour; (*b*) if all the wheels not fitted with pneumatic tyres are fitted with tyres made of soft or elastic material, twelve miles per hour; (*c*) if some of the wheels are not fitted with either pneumatic or soft tyres and the weight of the car unladen does not exceed 3 tons and the registered axle-weight of no axle thereof exceeds 6 tons, eight miles per hour; (*d*) in all other cases, five miles per hour.[1] Similar provisions are made for heavy motor cars drawing trailers, the speed of which may in no case exceed twelve miles per hour.[2]

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[1] 1903 Act, s. 9 (1), as amended.

[2] *Christie* v. *Stevenson*, 1907 S.C. (J.) 100; 5 Adam 382 (complaint held good); *Connell* v. *Mitchell*, 1909 S.C. (J.) 13; 5 Adam 641 (complaint held bad).

[3] Sec. 18 (3). [4] Sec. 9 (1). [5] *Scott* v. *Jameson*, 1914 S.C. (J.) 187; 7 Adam 529.

[6] *Wright* v. *Mitchell*, 1910 S.C. (J.) 94; 6 Adam 287.

[7] *Taylor* v. *Horn*, 1929 S.L.T. 598. [8] Sec. 9 (2).

[9] *Hughes* v. *Nimmo*, 1910 S.C. (J.) 45; 6 Adam 217.

[10] *Dickson* v. *Stevenson*, 1912 S.C. (J.) 1; 6 Adam 541. See also the *dicta* of Lord Pres. Clyde and Lord Sands in *Taylor* v. *Horn*, 1929 S.L.T. 598.

[11] Sec. 10. As to the proper place for the erection of such notices, see the observations by Lord Justice-Clerk Macdonald in *Yeaman* v. *Jameson*, 1910 S.C. (J.) 8; 6 Adam 149.

SECTION 9.—INTERNATIONAL CIRCULATION OF MOTOR CARS.

222. The Motor Car (International Circulation) Act, 1909,[3] enables His Majesty, by Order in Council, for the purpose of giving effect to any convention for facilitating the international circulation of motor cars, to provide (*a*) for the grant and authentication of any travelling passes or certificates which may be of use to British residents when temporarily taking their cars abroad; and (*b*) for modifying the provisions of the Motor Car Act, 1903, relating to the licensing of motor-car drivers in the case of cars brought temporarily into the United Kingdom by persons resident abroad and intending to make only a temporary stay. The relative Order in Council—the Motor Car (International Circulation) Order, 1910[4]—was brought up to date and amended to bring the law into conformity with the Roads Act, 1920, and the Finance Act, 1920, by the Motor Car (International Circulation) (Amendment) Order, 1921,[5] the Road Vehicles (International Circulation Permit) Regulations, 1921,[6] and the Motor Cars (Temporary Importation) Regulations, 1925.[7]

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[1] Heavy Motor Cars (Amendment) Order, 1928, Article VII. (1).

[2] Article VII. (2).

[3] 9 Edw. VII. c. 37.

[4] S.R. & O. 1910, No. 421.

[5] S.R. & O. 1921, No. 1574.

[6] These Regulations, being provisional within s. 2 of the Rules Publication Act, 1893, and not statutory, are not printed in S.R. & O.

[7] S.R. & O. 1925, No. 1185.

MOURNINGS.

See HUSBAND AND WIFE; MARRIAGE CONTRACT.

MOVEABLES.

See HERITABLE AND MOVEABLE SUCCESSION.

MOVEABLES (DELIVERY OF).

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SECTION 1.—MEANING OF TERMS.

SUBSECTION (1).—*Moveables.*

223. Moveables, in Scotland, are either corporeal or incorporeal. Corporeal moveables comprehend such "as are palpable to sense; incorporeal such as consist in legal right merely." [1] Corporeal moveables (other than money) are called "goods," [2] and it is to the delivery of such corporeal moveables that attention will be chiefly directed in this article. It is to be observed, however, that the same general principles apply for the most part to the transfer of incorporeal moveables, such as debts or shares, except that, as a rule, such incorporeal rights cannot be transferred without writing (see ASSIGNATION).[3] Money, though in a sense a corporeal moveable, is representative of value or price, and is therefore placed in a category by itself.

SUBSECTION (2).—*Delivery.*

224. "Delivery" has been defined by statute as the "voluntary transfer of possession from one person to another." [2] It has also by another statute been defined as the "transfer of possession, actual or constructive, from one person to another." [4] The former definition is to be preferred, as by the word "voluntary" it rightly excludes transfers of possession arising from the death or bankruptcy of the previous possessor, and also transfers arising from unlawful acts, such as theft.

225. The definition given above is to some extent wanting in precision, for it depends upon the meaning of the somewhat ambiguous term "possession," which has been the subject of much learned exposition and discussion.[1] Erskine defines possession as "the detention of a subject with an *animus* or design in the detainer of holding it as his own property";[2] and, consistently with this definition, he speaks of tradition as "the delivery of the possession of a subject by the proprietor with an intention to transfer the property of it to the receiver.[3] This, however, is an imperfect view, for it excludes many cases of rightful possession on a title short of ownership. "Possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or factor. Mere possession without a just title gives no property."[4]

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[1] Bell, Com. (7th ed.), i. 100.

[2] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1).

[3] Vol. II. p. 5, *ante*.

[4] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2.

226. The possession referred to in the statutory definition of delivery and in Erskine's definition of possession is of course lawful possession, and is also to be distinguished from the custody had by a servant holding property of his master. The servant cannot be said to have possession of such property in any true or exclusive sense, but merely holds the same as custodier for his master subject to the latter's direction and control.[5] There remain, however, well-known categories of legal relationships in which possession in the true sense and the right of property in the goods possessed do not run together. No doubt possession, in the absence of any obvious subordinate title, gives rise to a presumption of ownership. Bell speaks of possession as the "badge of property in moveables,"[6] and of delivery *de manu in manum* as "the true and proper badge of transferred property."[7] See POSSESSION. On the other hand, even Bell is compelled to admit that "an adherence to this plain and simple rule is utterly impossible amidst the complicated transactions of modern trade."[7]

227. All modern writers recognise two distinct forms of title arising from delivery: (1) absolute, as in sale; (2) qualified, as in pledge, hiring, carriage, etc. In England, contracts of the latter class are called "bailments," the owner being called the "bailor," and the person intrusted with the possession being called the "bailee." Where the transfer is by way of ownership, the right conveyed is known in England as the "general property"—also called the "absolute property" in cases where the ownership and possession are united in the same person[8]—as distinguished on the one hand from a "special property," and on the other hand from mere lawful possession. A special property in goods implies a right to retain for a time as against the true owner, as in the contracts of pledge and hiring, while simple possession without ownership implies a power in the holder of the general property to determine the contract at any time, as in agency, and sometimes in carriage. The term "special property" has no place in our legal system, and there is no room for the conception of a limited right of property corresponding thereto.[1] The distinction in Scotland is merely between possession on the one hand and the right of property in the goods on the other hand. In Scotland the contract of pledge of corporeal moveables does not involve the passing of the property. In the case of a security over goods created by the transfer of documents of title, with the possible exception hereafter noted[2] of the case of bills of lading, the property in the goods is passed to the transferee subject to a personal obligation to reconvey them.[3]

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[1] See, *e.g.*, Savigny, Possession; Pollock and Wright, Possession in the Common Law; O. W. Holmes, The Common Law.

[2] Ersk. Inst. ii. 1, 20.

[3] *Ibid.*, 18.

[4] Per Lord Loughborough in *Mason* v. *Lickbarrow*, 1790, 1 Bl. H. 357, at p. 360.

[5] As, *e.g.*, in the case of *Barnton Hotel Co., Ltd.* v. *Cook*, 1899, 1 F. 1190; see also Gloag and Irvine on Rights in Security, p. 342.

[6] Bell, Com. (7th ed.), i. 269.

[7] *Ibid.*, 178.

[8] Blackstone, Com., 4th ed., ii. 342; M. P. Brown on Sale, p. 6.

SECTION 2.—SUBJECTS OF DELIVERY.

228. The immediate subject of delivery may be either the moveables themselves, if corporeal, or some paper representative, such as a "document of title" or a bill of exchange. Bills of exchange, promissory notes, and cheques represent money.[4] Documents of title may represent moveables whether corporeal or incorporeal, but according to the usual definition they are confined to documents representative of "goods" in the sense above mentioned.[5] See DOCUMENT OF TITLE.[6] The transfer of such representative documents may be accomplished in all cases by an assignation, in most cases by indorsation, and in many cases (*e.g.* where the document orders delivery to bearer) by the mere passing of the document from hand to hand (see ASSIGNATION). In order to complete delivery, it is in most cases necessary, in addition to the transfer of the representative document, to give intimation to the holder of the thing represented, and for this purpose a debtor or other obligant is treated as holder.

229. Intimation may in general be said to be necessary in all cases of the transfer of representative documents other than bills of lading and bills of exchange.[7] The effect of such intimation being to constitute the party in possession holder for the transferee it is held to operate constructive delivery and is effectual to give the transferee a real right in the subject represented by the document.[8] It is a condition of effecting this result that the holder of the goods shall occupy a position independent of the owner, the rule having no application where the holder is a servant or employee of the owner of the goods.[1] It is also in general a condition that the goods must be specific,[2] though it has been laid down that this condition does not apply in the case of goods represented by bills of lading.[3] With regard to the possible effect of the Factors Acts in rendering this condition inapplicable in a limited class of cases, see DOCUMENT OF TITLE.[4]

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[1] *Hayman & Son* v. *M'Lintock*, 1907 S.C. 936, per Lord Dunedin at p. 949.

[2] See para. 230, *infra*.

[3] *Hamilton* v. *Western Bank of Scotland*, 1856, 19 D. 152.

[4] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 3, 73, 83.

[5] Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (4); Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40), s. 1; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1).

[6] Vol. VI. p. 29, *ante*.

[7] As to the difference between the effect of a bill of lading and a delivery order, see *M'Ewan* v. *Smith*, 1849, 6 Bell's App. 340, per Lord Cottenham L.C. at p. 352.

[8] See *Connal & Co.* v. *Loder*, 1868, 6 M. 1095; *Black* v. *Incorporation of Bakers, Glasgow*, 1867, 6 M. 136, per Lord Pres. Inglis at pp. 141–42; *Inglis* v. *Robertson & Baxter*, 1898, 25 R. (H.L.) 70, per Lord Watson at p. 74.

230. As regards bills of exchange and bills of lading the mere indorsation and handing over of the documents operate in the case of the former complete transference of the rights represented by the document, and in the case of the latter complete delivery of the goods. A bill of exchange being a negotiable instrument in the strict sense no question of intimation arises, and in the case of a bill of lading, intimation is held to be unnecessary. Bills of lading differ from other documents of title to goods in this that they are regarded as symbols of the goods which they represent, the transference of the bills of lading duly indorsed without intimation operating symbolical delivery of the goods, and being in all cases equivalent to the actual delivery of the goods themselves. See DOCUMENT OF TITLE. In the case of other documents of title the transfer of the document, when followed by intimation, has the necessary legal effect of transferring the property in the goods.[5] It seems doubtful whether this result follows of necessity from the transfer of bills of lading, or whether, as in the case of the actual delivery of the goods of which they are the symbols, that question depends on the nature of the contract intended by the parties as one of sale or pledge. The latter view is stated as the law by Lord Trayner in the case of *North-Western Bank* v. *Poynter, Son & Macdonalds*.[6] On the other hand, in the case of *Hayman & Son* v. *M'Lintock*,[7] Lord President Dunedin apparently treats bills of lading as falling within the doctrine above stated with regard to other documents of title.

231. The effect of s. 3 of the Factors Act, 1889, in regard to the question of intimation in cases of the pledge of documents of title was considered in the case of *Inglis* v. *Robertson & Baxter*.[8] In the Court of Session it was held by the whole Court (Lord Young dissenting) that the meaning and effect of the section referred to in cases to which it applied was that a pledge of documents of title, but only when duly completed in accordance with the rules of the common law, was to be deemed a pledge of the goods. The House of Lords found it unnecessary to decide the question as to the necessity of intimation in order to create a real right, holding that the section was limited in its application to cases of pledge made by a mercantile agent under the Act and was inapplicable in the circumstances of that case. Lord Halsbury, L.C., and Lord Watson, however, were apparently of opinion that the effect of the section in cases to which it applied was to enable a pledge of the goods to be effected without intimation.

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[1] *Dobell Beckett & Co.* v. *Neilson*, 1904, 7 F. 281; *Anderson* v. *M'Call*, 1866, 4 M. 765; *Pochin & Co.* v. *Robinows & Marjoribanks*, 1869, 7 M. 622, per Lord Pres. Inglis at pp. 628–29; see also Gloag and Irvine on Rights in Security, p. 195.

[2] *Pochin & Co.* v. *Robinows & Marjoribanks*, *supra*, per Lord Pres. Inglis at pp. 628–29; *Hayman & Son* v. *M'Lintock*, 1907 S.C. 936, per Lord Pres. Dunedin at p. 951, and Lord M'Laren at p. 952; *Price & Pierce, Ltd.* v. *Bank of Scotland*, 1910 S.C. 1095, per Lord Kinnear at pp. 1110–11, and Lord Pres. Dunedin at p. 1120; see also *Laurie & Morewood* v. *Dudin & Sons*, [1926] 1 K.B. 223, per Bankes L.J. at p. 232.

[3] *Hayman & Son* v. *M'Lintock*, *supra*, per Lord M'Laren at p. 952.

[4] Vol. VI. p. 35, *ante*.

[5] *Hamilton* v. *Western Bank of Scotland*, 1856, 19 D. 152.

[6] 1894, 21 R. 373, at p. 524.

[7] 1907 S.C. 936, at p. 949.

[8] 1897, 24 R. 759; affd. 1898, 25 R. (H.L.) 70, and [1898] A.C. 616.

Section 3.—Delivery involving Change of Ownership.

232. This applies to Barter, Sale, and Donation.

Subsection (1).—*Barter or Exchange.*

233. In this case delivery is of greater importance in Scotland than in England. The Sale of Goods Act, 1893, does not include exchange—a clause explanatory of the contract, and making the Act applicable to it, having been deleted in the passage of the Bill through Parliament. The common law of Scotland, differing from that of England, made delivery necessary to the completion of every contract involving a change in the ownership of moveables; and though in sale this has been altered by the Act referred to, the old rule seems still applicable to barter or exchange. Accordingly in barter there is no passing of the property on either side until delivery of both of the subjects of exchange has taken place.[1] It is open to question whether or not, in order to pass the risk, delivery is necessary in Scotland under the contract of exchange, though it has not been necessary in sale, at least since the time of Stair.[2]

Subsection (2).—*Sale.*

(i) *Statutory Rules regarding Delivery.*

234. Rules as to delivery form part of the codified law of sale.[3] In the normal contract the exchange of possession for a price is simultaneous—delivery and payment being concurrent conditions (s. 28). There may, however, be modifying conditions, either express or implied (ss. 27, 29). The price may be paid before delivery, or delivery may precede payment, as in the case of sales on credit. If, in a sale for ready money, the buyer, by error or fraud, receives the goods without making payment of the price, no credit is given, and no property passes to the buyer;[4] but if credit is once allowed the goods are the property of the buyer, and even if the credit has been obtained by fraud or misrepresentation the goods may be validly transferred by him for value to an innocent third party, or possibly appropriated to his general creditors.[1]

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[1] Stair, i. 14, 1.

[2] See Brown on the Sale of Goods (2nd ed.), pp. 41–43, where the differences between barter and sale are discussed; see also Barter, Vol. II. p. 162, *ante*.

[3] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

[4] Bell, Com. (7th ed.), i. 258; *Loeschmann* v. *Williams*, 1815, 4 Camp. 181; *Bishop* v. *Shillito*, 1819, 2 B. & Ald. 329, per Bayley, J.

235. The terms of the contract, express or implied, usually determine the question whether the seller is to send the goods to the buyer, or whether the buyer is to send for the goods to the seller. Apart from contract, it is the buyer's duty to send for the goods to the seller's place of business, if he has one, and if he has none, then to his residence. In the case of specific goods, which at the time of the contract both parties knew to be in some place other than the seller's place of business or residence, that other place is the place of delivery (s .29 (1)). Where the seller is to send the goods, but no time is fixed, they must be sent within a reasonable time (s. 29 (2)). Where, under the contract, it is the seller's duty to put the goods into a "deliverable state," the expense must be borne by him (s. 29 (5)).

236. In regard to wrong quantities, if the seller delivers less than the contract quantity, the buyer may reject; but if the buyer accept, he must pay for the goods at the contract rate (s. 30 (1)). If the quantity delivered is in excess of the contract, the buyer may accept the contract quantity and reject the rest, or he may reject the whole. If he accepts the whole, he must pay for the whole at the contract rate (s. 30 (2)). Where, on delivery, the contract goods are mixed with others not under the contract, the buyer may accept the goods under the contract and reject the rest, or he may reject the whole (s. 30 (3)). The third alternative of retaining the whole and claiming damages under s. 11 (2) in respect of the part disconform to contract is not excluded, and was given effect to in a Sheriff Court case.[2] Unless otherwise agreed, the buyer is not bound to accept delivery by instalments (s. 31 (1)). Where the contract provides for instalments, to be separately paid for, a breach of contract by either party in respect of one instalment may or may not amount to a breach of the whole contract: "It is a question in each case, depending on the terms of the contract and the circumstances of the case" (s. 31 (2)).

237. Where, in terms of the contract, the seller is to send the goods to the buyer, delivery to a carrier for transmission to the buyer is *prima facie* a delivery to the buyer himself (s. 32 (1)). Where the seller delivers to a carrier, he must make such a contract with him as may be reasonably necessary for the safety of the goods; and if he fail to do so, and the goods are lost or damaged, "the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages" (s. 32 (2)). Where goods are sent by "a route involving sea transit," the seller must give such notice to the buyer as will enable him to insure them during the sea transit, and on failure, the goods are at the seller's risk (s. 32 (3)). Formerly, in Scotland, where, in terms of the contract, goods were to be delivered by the seller elsewhere than at the place they were in at the time of sale, the seller undertook the whole risk of the transit,[1] but the common law of England excepted such deterioration as was necessarily incident to the course of the transit. This is now the statutory law of the United Kingdom (s. 33).

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[1] *Richmond* v. *Railton*, 1854, 16 D. 403; *Arnot* v. *Watt*, 1825, 4 S. 4; *A. W. Gamage, Ltd.* v. *Charlesworth's Tr.*, 1910 S.C. 257.

[2] *Smedley & Co.* v. *Hyslop & Macdonald*, 1908, 24 Sh. Ct. Rep. 355.

238. Where a tender of delivery is made, the buyer is entitled to a reasonable opportunity of examining the goods "for the purpose of ascertaining whether they are in conformity with the contract" (s. 34 (2)). Goods delivered are not held to be accepted by the buyer unless he has had such reasonable opportunity (s. 34 (1)), or unless he has intimated his acceptance to the seller, or has done some "act in relation to the goods which is inconsistent with the ownership of the seller," or has retained them without intimating his rejection (s. 35). Where the buyer rightfully refuses to accept delivered goods, he is not bound to return them to the seller, an intimation of rejection being sufficient (s. 36). If the buyer wrongfully neglects or refuses to accept delivery, he is liable to the seller for any loss occasioned by such neglect or refusal, and also for a reasonable charge for care and custody (s. 37).

(ii) *Actual and Constructive Delivery.*

239. Delivery upon a sale of goods may be "actual" or "constructive." Actual delivery (sometimes called "real" delivery) "places the thing sold within the grasp and in the personal apprehension of the buyer or of his servants, clerks, and others whom the law identifies with him and considers as his hands."[2] Constructive delivery involves a change of constructive possession, without any change in the actual custody. This takes place chiefly where the goods sold are in the hands of a third person, such as a carrier or warehouseman, whose possession, formerly held for the seller, will, after constructive delivery, be attributed to the buyer.[3] In Scotland, before the change in the law effected by the Sale of Goods Act, actual delivery was only dispensed with under the pressure of necessity, and Bell enters an emphatic protest against the admission of constructive delivery in any case where the necessity is not of an "absolute kind."[4]

240. Constructive delivery was first recognised in connection with the contract of carriage of specific goods at sea, and was effected by the indorsation and delivery of the bill of lading, which was treated for this purpose as a paper representative of the goods. There was no necessity for intimation to the custodier, as in the case of a formal assignation of incorporeal rights, and the indorsee was not affected by latent claims pleadable against the indorser. The common law on this subject was established in Scotland in 1787,[5] and in England in 1793.[6] Early in the nineteenth century the common law extended the principle of constructive delivery by indorsation to dock warrants, delivery orders, and some other documents relating to specific goods, but the privilege was accompanied in Scotland by the requirement of intimation to the custodier,[1] and in England by the requirement of attornment, by which the custodier acknowledged to the indorsee that in future he would hold the goods on his behalf.[2] The practice of merchants, however, had in the meantime introduced constructive delivery by the indorsation of certain documents, particularly dock warrants, without requiring intimation or attornment. This practice received recognition at common law in a series of cases,[3] but was denied effect in the case of *Farina* v. *Home*.[4] The general rules according to modern law and practice regarding the necessity of giving intimation in order to create a real right in the goods where the transfer is effected by documents of title are dealt with above.[5] See also DOCUMENT OF TITLE.[6]

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[1] Bell, Com. (7th ed.), i. 474.

[2] *Ibid.*, i. 181; Ersk. ii. 1, 19, iii. 3, 8.

[3] Bell, Com. (7th ed.), i. 194.

[4] *Ibid.*, i. 182.

[5] *Bogle* v. *Dunmore & Co.*, 1787, Mor. 14216.

[6] *Lickbarrow* v. *Mason*, 1793, 6 East, 21.

241. In the case of a document which does not conform to the definition of a document of title contained in s. 1 (4) of the Factors Act, 1889, and s. 62 (1) of the Sale of Goods Act, 1893, the latter Statute introduced into Scotland the English principle of "attornment." It had been previously held, in Scotland with regard to goods in the hands of a third party, that it was the notice to the custodier which operated the transfer of the property,[7] but it is now enacted that in a contract of sale, apart from documents of title, delivery by seller to buyer is not effected until the custodier acknowledges to the buyer that he holds the goods on the buyer's behalf.[8] This statutory rule applies only to contracts of sale of goods; the law relating to the constitution of securities and to all other contracts involving delivery remains unaffected.

242. One of the effects of the change introduced into the Scots law of sale by substituting intention for actual delivery in passing the ownership of goods, has been to render constructive delivery possible though the goods are not in the hands of a middleman, but remain with the seller. In such cases the seller holds as bailee for the buyer to whom the property has passed. This follows from s. 17 of the Sale of Goods Act, 1893, and is recognised elsewhere in the Act, as in ss. 20 and 25. At one time constructive delivery was applied to cases of stoppage *in transitu* to the effect of limiting the operation of that doctrine.[9] So far as Scotland is concerned, this view was corrected by the House of Lords in 1849, in a case already referred to.[10]

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[1] *John Tod & Co.* v. *Rattray*, 1st Feb. 1809, F.C.; *Auld* v. *Hall & Co.*, 12th June 1811, F.C.

[2] *Hurry* v. *Mangles*, 1808, 1 Camp. 452; *Harman* v. *Anderson*, 1809, 2 Camp. 243; *Stonard* v. *Dunkin*, 1809, 2 Camp. 344, all per Lord Ellenborough.

[3] *Spear* v. *Travers*, 1815, 4 Camp. 251; *Lucas* v. *Dorrien*, 1817, 7 Taunt. 278; *Zwinger* v. *Samuda*, 1817, 7 Taunt. 265; and *Keyser* v. *Suse*, 1818, Gow, 58.

[4] 1846, 16 M. & W. 119.

[5] See paras. 229, 230, *supra*.

[6] Vol. VI, p. 29, *ante*.

[7] Bell, Com. (7th ed.), i. 194; *Black* v. *Incorporation of Bakers, Glasgow*, 1867, 6 M. 136, per Lord Pres. Inglis at p. 141; see also Brown on Sale of Goods (2nd ed.), pp. 209-10, where this matter is discussed.

[8] Sale of Goods Act, 1893, s. 29 (3).

[9] Bell, Com. (7th ed.), i. 228, 233.

[10] *M'Ewan* v. *Smith*, 1849, 6 Bell's App. 340, per Lord Campbell at p. 355. The application of this decision was subsequently discussed in *Melrose* v. *Hastie*, 1851, 13 D. 880.

243. Constructive delivery is sometimes treated as identical with, or at least as embracing, "symbolical delivery."[1] It may be doubted, however, if, apart from the case of bills of lading there is any room for the doctrine of symbolic delivery of moveables. The instance commonly given is that of the delivery of the key of a warehouse or of a chest containing the articles intended to be delivered,[2] but this has been shewn to be actual delivery. The key is not a symbol of possession, but gives to the buyer access to the actual possession and power over the article, to the exclusion of the seller.[3]

Subsection (3).—*Donation.*

244. Where a gift is intended, delivery is of much greater importance than under the contract of sale. In the Scottish law of sale certain substitutes for delivery were recognised by the Mercantile Law Amendment Act of 1856,[4] and since January 1, 1894, delivery may be entirely dispensed with, if such is the intention of parties.[5] But in regard to donation, and indeed in regard to all obligations and contracts other than sale the old rule of the common law still prevails: *Traditionibus non nudis pactis dominia rerum transferuntur.* See Donation.[6] The rule that delivery is necessary to the validity of a gift of moveables holds equally in England.[7] No doubt it is competent in either country to give legal effect to a donation by means of a formal and delivered deed, and the same general rule may be applied to a testamentary bequest, which requires no delivery. In Scotland, but not in England, a gift may also be made by the delivery of a bill of exchange or other document representing money or goods, provided it is granted or indorsed to the intended donee, and is duly delivered.[8] In order to effect donation "the party giving must dispossess himself—put it [*i.e.* the money or gift donated] entirely beyond his own control and his own use—and put it in possession of the party to whom he gives it."[9] In England, a gratuitous promise does not conform to the highly technical doctrine of "consideration," and will not receive effect even if contained in an agreement under hand or other instrument by which it is competent and usual to express a legal obligation. Nothing short of a deed under seal will be binding on the granter, and even this is a comparatively modern relaxation of the old law by which "no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery."[10]

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[1] *E.g.* Ersk. ii. 1, 19, iii. 3, 8; Addison, Contracts (11th ed.), p. 597; *Manton* v. *Moore*, 1796, 7 T. R. 67; *Chaplin* v. *Rogers*, 1800, 1 East, 192, per Lord Kenyon C.J. at p. 194.

[2] Brodie, Notes to Stair, p. 869.

[3] Bell, Com. (7th ed.), i. 186; Pollock and Wright, Possession, 60 *et seq.*

[4] 19 & 20 Vict. c. 60.

[5] Sale of Goods Act, 1893, ss. 17, 18.

[6] Vol. VI. p. 54, *ante.*

[7] *Irons* v. *Smallpiece*, 1819, 2 Barn. & Ald. 551.

[8] *Law* v. *Humphrey*, 1876, 3 R. 1192.

[9] Per Lord Young in *Milne* v. *Grant's Exrs.*, 1884, 11 R. 887, at p. 890, and quoted by Lord Pres. Dunedin in *Brownlee's Exrx.* v. *Brownlee*, 1908 S.C. 232, at p. 240.

[10] *Cochrane* v. *Moore*, 1890, 25 Q.B.D. 57, at p. 72.

SECTION 4.—DELIVERY FOR THE PURPOSE OF BAILMENT.

245. The English term "bailment" is comprehensive, and may be conveniently used for our present purpose. It is derived from the French *bailler*, to deliver, and imports "a delivery of goods for some purpose to a person (called the 'bailee') upon a contract, express or implied, that after the purpose has been fulfilled the goods shall be redelivered to the 'bailor,' or be otherwise dealt with according to his directions."[1] The contracts usually classed as bailments are pledge, deposit, agency, loan, and hiring, the last of which includes the contract of carriage and various minor contracts.

SUBSECTION (1).—*Pledge or other Security.*

246. A security over moveables in Scotland may take the form (1) of an *ex facie* absolute transfer of proprietary right,[2] in which case it will, on the principle of retention, cover future advances as well as those present and past in respect of which the transfer was made,[3] or (2) of an ordinary security depending for its efficacy on possession alone and covering merely a present advance or specific existing debt, or extending to future advances according to the contract between the parties. The transaction is of the former character when a security is created over moveables by means of the transfer of ordinary documents of title, the security-holder being under a personal obligation to reconvey the subjects on the debt being paid.[4] The ordinary example of the latter form of transaction is provided by the contract of pledge. In either case a complete transfer of possession by actual or constructive delivery to the security-holder, in accordance with the principles already mentioned, is essential. In the case of pledge it is necessary that there should be actual delivery of the subjects themselves.[3] See PLEDGE. A transaction effecting a security has in several cases been sustained without delivery where it had taken the form of a sale, and when in this form it was held to come under the Mercantile Law Amendment (Scotland) Act, 1856,[5] and to be entitled to the same privileges, in questions of delivery, as would in similar circumstances have attached to an ordinary sale.[6] But the sale sections of the Mercantile Law Amendment Act have been repealed by the Sale of Goods Act, 1893 [7] (s. 60), and the new privileges which by the latter Act are allowed to sale (*e.g.* transfer of property without delivery) are expressly excluded from "any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security" (s. 61 (4)). The decisions on the question prior to the Sale of Goods Act were in some cases hard to reconcile,[1] the distinctions between them being extremely narrow. It has, however, been considered by the Court in several recent cases.[2] The determining factor in deciding whether a transaction is one of proper sale has been held to be the contractual intention with which the parties entered into the transaction, and not the motive by which they may have been inspired.[3] The principal considerations which have influenced the Court in holding a transaction to be one of sale have been the absence of any personal obligation on the part of the person receiving money to repay, and the circumstance of there being no marked disparity between the sum paid and the value of the subjects transferred.[4]

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[1] Stephen, Com. (17th ed.), iii. 159.

[2] *Hamilton* v. *Western Bank of Scotland*, 1856, 19 D. 152; *Mackinnon* v. *Max Nanson & Co.*, 1868, 6 M. 974.

[3] *Hamilton* v. *Western Bank of Scotland*, *supra*.

[4] See paras. 227 and 230, *supra*.

[5] 19 & 20 Vict. c. 60.

[6] *M'Bain* v. *Wallace & Co.*, 1881, 8 R. (H.L.) 106.

[7] 56 & 57 Vict. c. 71.

SUBSECTION (2).—*Other Bailments.*

247. In these cases the question of delivery seldom presents much complexity. The intention being to transfer the possession for a time upon certain conditions, the conditions assume greater importance than the fact or mode of the transfer. It may be observed, however, that mere custody of an article does not necessarily imply possession in the legal sense, and hence such custody is not conclusive either as to ownership or bailment.[5] It was at one time held, in England, that a servant entrusted with an article had possession as bailee of the master, and that therefore appropriation to himself was embezzlement or breach of trust, but did not involve the crime of larceny.[6] It was, however, soon afterwards definitely settled that no possession passed to the servant, and that therefore such appropriation was a theft of his master's property.[7] This was but the reassertion of an older law, thus stated by Sir Edward Coke: "There is a diversity between a possession and a charge, for when I deliver goods to a man he hath the possession of the goods and may have an action of trespass or an appeal if they be taken or stoln out of his possession, but my butler or cook that in my house hath the charge of my vessel or plate hath no possession of them, nor shall have an action of trespass or an appeal as the bailee shall, and therefore if they steal the plate or vessel it is larceny." [8] Certain anomalies in this branch of English criminal law were removed in 1857.[9] Similar questions as between embezzlement and theft have arisen in Scotland, the crime to be charged depending upon whether the accused had the control and administration of the property (embezzlement) or had a bare custody (theft). The tendency in the more recent cases has been to enlarge the scope of the more serious crime.[10]

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[1] Per Lord Moncreiff in *Robertson* v. *Hall's Tr.*, 1896, 24 R. 120, at p. 135; see the opinion of Lord Kincairney at p. 127, where the cases are collected.

[2] *Gavin's Tr.* v. *Fraser*, 1920 S.C. 674; *Newbigging* v. *Ritchie's Tr.*, 1930 S.L.T. 333; *Hepburn* v. *Law*, 1914 S.C. 918.

[3] *Gavin's Tr.* v. *Fraser*, *supra*, per Lord Pres. Clyde at p. 687.

[4] *Ibid.*, at pp. 684, 685.

[5] See paras. 225, 226, *supra*.

[6] *R.* v. *Watson*, 1788, 2 East, P.C. 562.

[7] *R.* v. *Lavender*, 1793, 2 East, P.C. 566.

[8] Inst. iii. 108.

[9] 20 & 21 Vict. c. 54, s. 4.

[10] Macdonald, Criminal Law (4th ed.), 64.

MUIRBURN.

See GAME LAWS.

MULTIPLEPOINDING.

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SECTION 1.—NATURE OF THE ACTION.

248. An action of multiplepoinding is so called because it is the action by which the claims of any number of claimants to the same fund or piece of property are decided. It is a form of process the object of which is to have it decided which of two or more parties called claimants is entitled to a fund, or in what proportions a fund is to be divided among several claimants. The process of double- or multiplepoinding is mentioned in an Act of Sederunt of 1st February 1677 as being the proper process for settling the preferences of various arresters. The action was, however, known at a much earlier date, and is dealt with in an Act of James VI.[1] The original purpose of the action was to benefit the holder of the fund by suspending multiple- or double-poinding where arrestments had been used in his hands by creditors of the common debtor to whom the fund belonged. The holder of the fund being willing to pay to the person entitled to payment, the object of the action was to relieve him of the responsibility of deciding to whom he should pay, and to prevent his being troubled by demands for payment by the various claimants.

249. The scope of the action has gradually become wider. It may be raised not only by the holder of the fund, but by any claimant. In all cases the holder of the fund is the pursuer. Where he raises the action he is called the pursuer and real raiser; where it is raised in his name he is called the pursuer and nominal raiser, and the claimant raising the action is called the defender and real raiser. It must always be stated in the summons who is the real raiser. If a claimant raises the action, the condescendence to the summons should not contain any statements which the pursuer and nominal raiser might deny.[1]

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[1] 1584, c. 3.

SECTION 2.—DOUBLE DISTRESS.

250. The tendency of modern decisions has been to allow greater laxity as to what constitutes double distress, and to give the holder of a fund, against which more than one claim is made, the benefit of this form of action, which relieves him of all responsibility when the competitors have been properly brought into Court. The original idea, that actual double diligence must have been done, has long been superseded, and double distress is held to exist wherever there is a " double claim to one fund on separate and hostile grounds." [2] There must, however, be truly competing claims. A multiplepoinding cannot competently be used as a method of distribution of an executry estate, so as to supersede the necessity of executry administration.[3]

251. A distinction has been drawn between a multiplepoinding raised by the holder of a fund and one raised by one of the competitors in name of the holder, and the practice of the Court on the point has been thus stated: "We allow an action of multiplepoinding to be brought by a competing party in name of the neutral person, but that is never allowed except when there is double distress in the strict and proper sense of the term. If a person thinks himself entitled to some property which is in possession of another, his course is to raise a direct action. He is not entitled to raise a multiplepoinding on the mere report that someone else is claiming the fund. When there are double actions or double diligence, then the only way to extricate the matter is by a multiplepoinding. The practice of our Courts, however, warrants a much greater latitude in the case of the holder of a fund than in the case of the competitors, and for the reason that the holder of the fund can never raise a direct action, and is not bound to remain a depositary till the day of his death, or till the disputing parties agree to settle their claims. He is entitled to be relieved, by means of an action of multiplepoinding, after a reasonable time, and accordingly it is a sufficient justification of the institution of the action, and is the criterion of its competency, that the claims intimated make it impossible for the depositary to pay to one of the parties without running the risk of an action at the instance of the other." [4]

252. There are many cases of multiplepoindings raised by a competitor which have been dismissed on the ground that there was really no double distress, and the proper course was a direct action for payment, or an action of accounting or furthcoming, or a suspension; as, for instance, where a son claiming legitim raised a multiplepoinding in name of his father's executors;[1] where one of many creditors of a deceased insolvent raised a multiplepoinding in name of the deceased's trustees, most of the other creditors having acceded to a private trust for winding up the estate;[2] where beneficiaries under a trust, alleging that the trustees were paying creditors who had not a good claim, raised a multiplepoinding in name of the trustees;[3] and where on similar grounds a multiplepoinding was raised by a non-acceding creditor in name of the trustee under a voluntary trust.[4] Where a lady threatened with an action for a sum of money consigned the sum in bank in joint names of her agents and the agents for the alleged creditor, a multiplepoinding brought by the creditor in name of the bank was held incompetent.[5] A. paid to B.'s agent a sum of money which he owed to B., and then raised an action of reduction against B., and arrested on the dependence; he then raised a multiplepoinding in the agent's name; the action was dismissed, as A.'s proper course was to bring a furthcoming if he succeeded in his action against B.[6] Again, A., who disputed a claim made against him by B., deposited a sum of money in the hands of C. to meet B.'s claim, if made good; B. raised a multiplepoinding in C.'s name, which was held incompetent, there being no double distress.[7] A sum of money was left to a truster's widow, to be divided among her relations as she should think fit; it was paid into bank in her name; certain of the relations raised actions against her and arrested the funds in bank; they then brought a multiplepoinding in name of the bank; the action was dismissed, on the ground that there was no double distress.[8] Where the holder of a fund is willing to pay it to a person who has undoubted right to payment, it is incompetent to call the holder into Court in a multiplepoinding because of a dispute as to how the money should be ultimately applied by the recipient.[9]

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[1] *Carmichael* v. *Todd*, 1853, 15 D. 473.

[2] *Russel* v. *Johnston*, 1859, 21 D. 886.

[3] *Britannic Assurance Co.* v. *James Henderson, Ltd.*, 1912 S.C. (J.) 31.

[4] *Winchester* v. *Blakey*, 1890, 17 R. 1046, per Lord M'Laren at p. 1050 ; cf. *Commercial Bank of Scotland* v. *Muir*, 1897, 25 R. 219, per Lord Kinnear ; *Colonial Mutual Life Assurance Society* v. *Brown*, 1911, 48 S.L.R. 427, per Lord Justice-Clerk.

253. On the other hand, many actions raised by competitors in name of the holder of the fund have been held competent. Creditors of S. arrested in hands of railway company goods belonging to S. but addressed to R.; R. claimed the goods as his own, and produced a receipt from S. for the price of the goods. The multiplepoinding raised in name of the railway company was objected to by R., on the ground that there was no double distress till the receipt was reduced; but the objection was repelled.[10] An action had been raised against an executor by a creditor of the deceased; this creditor's claim, which would have swallowed up the whole estate, was objected to by other creditors, one of whom, with the consent of the executor, raised a multiplepoinding in his name, and this action was held competent.[1] A multiplepoinding, raised in name of a factor *loco absentis* by a person who alleged that he had right to the estate of the absentee, was held competent as a form of process to try the question whether and when the absentee had died.[2] An incoming tenant agreed to reap an outgoing tenant's crop and to pay its value to the landlord; a creditor of the outgoing tenant arrested in the hands of the incoming tenant; a multiplepoinding raised by the landlord was held competent.[3] A fund was subscribed for certain congregational purposes; it was deposited in bank; two parties in the congregation claimed it, and a multiplepoinding raised by a competitor was held competent.[4]

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[1] *Crokat* v. *Lord Panmure*, 1853, 15 D. 737; *Johnston* v. *Richardson* (O.H.), 1905, 13 S.L.T. 537.

[2] *Crichton* v. *Irvine*, 1836, 14 S. 628.

[3] *Robb's Trs.* v. *Robb*, 1880, 7 R. 1049; cf. *Gordon* v. *Gordon*, 1895, 32 S.L.R. 355; 2 S.L.T. 551.

[4] *Kyd* v. *Waterson*, 1880, 7 R. 884.

[5] *Royal Bank of Scotland* v. *Ellis* (O.H.), 1902, 10 S.L.T. 167.

[6] *Stewart* v. *Stewart*, 1828, 7 S. 145.

[7] *Clark* v. *Campbell*, 1873, 1 R. 281.

[8] *Bank of Scotland* v. *Comrie*, 1871, 8 S.L.R. 419.

[9] *Commercial Union Assurance Co.* v. *Globe Co.*, 1916, 1 S.L.T. 343.

[10] *North British Rly. Co.* v. *White*, 1881, 9 R. 97.

254. Although the Court is more willing to allow the holder of the fund to use this form of process, yet there have been many cases in which a multiplepoinding brought by him has been dismissed as incompetent. A discharge was offered to debtors under a bond and disposition in security; the debtors, on the ground that the claimants were not *in titulo* to grant a valid discharge, raised a multiplepoinding; the action was thrown out as incompetent because there was no double distress.[5] So also where a trustee, in doubt whether a legacy should be paid to a legatee's assignee, who claimed it, or to his trustee in bankruptcy, who did not claim it, raised a multiplepoinding, the action was dismissed on the same ground.[6] The executor of a deceased claimed payment of a debt; the debtor raised a multiplepoinding, calling both the executor and the heir of the deceased as the defenders; the heir had made no claim, and the action was dismissed.[7] In a charter-party it was stipulated that freight should be paid by a third party, A., on production of certain certificates; the freighters put money into A.'s hands to meet the claim for freight; the owners claimed freight, but the freighters instructed A. not to pay, as they had counter-claims against the owners; a multiplepoinding raised by A. was held incompetent, there being no double distress.[8] A landlord called upon his tenant to pay rent due to him, and a tax-collector demanded from the tenant payment of an assessment due by the landlord; the latter did not dispute that the assessment was due and might be deducted from the rent; a multiplepoinding brought by the tenant was dismissed.[9] A. obtained a decree for a sum of money against B.; C., a creditor of A., arrested in B.'s hands, and B. raised a multiplepoinding; the action was dismissed, on the ground that there was no double distress, although other arrestments had been used after the action was raised.[1] A claim was made against a trust estate; some of the beneficiaries did not admit it, and the trustees raised a multiplepoinding for their exoneration; the action was dismissed, on the ground that there was no double distress, and expenses were given against the trustees as individuals.[2]

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[1] *Jamieson* v. *Robertson*, 1888, 16 R. 15.

[2] *Tait's Factor* v. *Meikle*, 1890, 17 R. 1182.

[3] *Park* v. *Watson*, 1874, 2 R. 118.

[4] *Connell* v. *Ferguson*, 1857, 19 D. 482.

[5] *Moncrieff* v. *Bethune*, 1844, 6 D. 1100.

[6] *Connell's Tr.* v. *Chalk*, 1878, 5 R. 735.

[7] *Great North of Scotland Rly. Co.* v. *Gauld*, 1863, 1 M. 1053.

[8] *Dennistoun* v. *Stewart & Co.*, 1853, 16 D. 154.

[9] *Logan* v. *Wilkie*, 1855, 17 D. 485.

255. On the other hand, it has frequently been held that the holder of a fund is entitled to bring a multiplepoinding even where one of the claims is obviously ill-founded, as he is not bound to take the risk of paying one applicant even if he thinks the other has not a good claim. He is entitled to the benefit of a decree ordaining him to pay. Thus in one case A. was found entitled to expenses in an action against him by B.; A.'s creditors arrested in B.'s hands and brought a furthcoming; when the account of expenses was taxed, A.'s law agents took decree in their own name as agents-disbursers, and charged B. for payment; B. raised a multiplepoinding, which was held competent; but it was observed that when the competition was decided the unsuccessful claimant might have to pay the whole expenses of process.[3] A.'s law agent obtained from him a bill in his favour; A. became bankrupt, and his trustee, and also a creditor, who had used arrestments, claimed the bill; a multiplepoinding raised by the agents was held competent.[4] A multiplepoinding was held competent which was raised by a bank as to a deposit receipt belonging to a deceased person. It was claimed by his granddaughter, on the ground that she had received it as a donation. The sons of the deceased had intimated that they objected to the bank paying the deposit receipt to the granddaughter.[5] An action was raised by certain trustees against an executrix for payment of a sum of money which had vested in and been assigned by A. to them; A. wrote to the executrix that she claimed payment of the sum to herself personally; the executrix raised a multiplepoinding, which was held competent; but it was observed that it was not sufficient for the holder of a fund to say "A claim has been made," without saying that some ground has been alleged on which the claim is based.[6] Where there were competing claims on the fund *in medio*, and it was in the actual custody of third parties, a multiplepoinding was held competent,[7] and the same was held even where the holders of the fund stated that they had no doubt as to who was entitled to the fund and would have no difficulty in obtaining a discharge.[8]

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[1] *Mitchell* v. *Strachan*, 1869, 8 M. 154; commented on in *Dill, Wilson & Muirhead* v. *Ricardo's Tr.*, 1885, 12 R. 404.

[2] *Mackenzie's Trs.* v. *Sutherland*, 1895, 22 R. 233.

[3] *Pollard* v. *Galloway & Nivison*, 1881, 9 R. 21.

[4] *Dill, Wilson & Muirhead* v. *Ricardo's Tr.*, *supra*.

[5] *Royal Bank of Scotland* v. *Price*, 1893, 20 R. 290.

[6] *Fraser's Exrx.* v. *Wallace's Trs.*, 1893, 20 R. 374.

[7] *M'Dowall and Neilson's Tr.* v. *Hagart & Co.*, 1905, 8 F. 235; *Commercial Bank of Scotland* v. *Muir*, 1897, 25 R. 219; *Ross* v. *Plano Co.*, 1902, 10 S.L.T. 314; *Agnew* v. *White*, 1899, 1 F. 1026.

[8] *Greenshields' Trs.* v. *Greenshields*, 1915, 2 S.L.T. 189.

256. One of several competing claimants for one-half of a trust estate raised a multiplepoinding, but made the whole estate the fund *in medio*. The action was dismissed as incompetent, on the ground that there was no double distress except as to one-half of the fund *in medio*.[1]

257. To the rule that the action is only competent when there are conflicting claims there is an exception in the case of trustees. When they are unable to obtain a discharge from the beneficiaries, or when a doubt exists as to whether all the parties to a succession are known, they can, for the purpose of obtaining a judicial discharge, raise an action of multiplepoinding and exoneration, although there are no conflicting claims.[2]

258. The subject of the disputed right in a multiplepoinding is usually a sum of money, but the right to any moveable or heritable property may be decided in this form of action.[3] It has been said that heritable property is not properly the subject of a multiplepoinding,[4] but Lord Kincairney decided otherwise in *Logan* v. *Byres*.[5] In *Edinburgh Merchant Maidens' Hospital* v. *Greig's Exrs.*[6] it was held that questions of title to heritage could competently be tried in an action of multiplepoinding. The right to title deeds and to corporeal moveables may be the subject of the action.[7] In an old case it was decided in a multiplepoinding which of two persons had been duly elected to a professorship of law.[8] It is doubtful whether the Court would now hold this form of process the competent one to try such a question.

259. All questions may be discussed and decided in a multiplepoinding which are necessary for the decision of the question to whom the fund *in medio* belongs. Thus the deeds founded on by claimants may be construed, their validity sustained,[9] or they may be reduced.[10] A decree in absence may be set aside *ope exceptionis*,[11] and deeds reducible under the bankruptcy statutes are often reduced incidentally in a multiplepoinding. Questions whether a deed has been delivered, whether a subject is heritable or moveable, questions as to legitimacy, and questions as to presumption of life, have all been discussed and decided incidentally in this form of action.[12] A multiplepoinding was held to be a competent process in which to ascertain the respective rights of a trustee in bankruptcy and a person claiming a right over the fund *in medio* in respect of advances and a lien.[1]

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[1] *Macnab* v. *Waddell*, 1894, 21 R. 827.

[2] See para. 279, *infra*.

[3] Bankt., iv. 42, 6.

[4] Mackay, Practice, i. 113.

[5] (O.H.), 1895, 2 S.L.T. 455; rep. on other points, *Byres' Trs.* v. *Gemmell*, 1895, 23 R. 332.

[6] (O.H.), 1902, 10 S.L.T. 317; cf. *Boyd's Trs.* v. *Boyd* (O.H.), 1906, 13 S.L.T. 878.

[7] *Baillie* v. *Baillie*, 1830, 8 S. 318.

[8] *Catanach* v. *Hamilton Gordon*, 1744, Mor. 12253.

[9] *Ogilvy's Trs.* v. *Chevallier*, 1874, 1 R. 693; but see *French* v. *Hohbach*, 1921, 2 S.L.T. 53.

[10] More's Notes to Stair, p. 378; *Logan* v. *Byres* (O.H.), 1895, 2 S.L.T. 455; A.S., 20th March 1907, s. 6; C.A.S., C, iv. 4 (*d*).

[11] *Jarvie's Trs.* v. *Bannatyne*, 1927 S.C. 34.

[12] *Tait's Factor* v. *Meikle*, 1890, 17 R. 1182; *Tulloh's Trs.* v. *Coles*, 1895, 3 S.L.T. 17; *Logan* v. *Logan*, 1823, 2 S. 253; *Ramsay* v. *Maule*, 1828, 6 S. 343.

260. A multiplepoinding cannot be raised where there is not a debt which the holder of the fund is bound to pay. The fund must be in the hands of the real raiser.[2] There must be a fund *in medio.*[3] The right to future rents cannot be decided,[4] nor questions as to a fund which has not been received,[5] or which is only *in spe.*[6] But the amount of the fund need not be definitely ascertained if there is a fund in existence. Thus a sum due under contract by the nominal raiser, though not certified as to amount by the engineer whose duty it was to grant certificates for work done, has been held to be enough.[7] Only disputed property may be included in the fund *in medio. Quoad* undisputed property the action will be held incompetent.[8] In a multiplepoinding a claimant was ranked and preferred to one-half of the fund *in medio*; the pursuer and real raiser then lodged a condescendence of the fund, claiming a right of compensation and retention of the share of the fund to which the claimant had been ranked and preferred. The competency was sustained.[9]

SECTION 3.—THE SUMMONS.

261. A form of summons of multiplepoinding is given in Schedule A. of the Court of Session Act, 1850.[10] The conclusions are (1) for declarator that the pursuer should be found liable only in once and single payment of the fund *in medio* (under deduction of charges and expenses) to the persons entitled thereto; (2) that for determining who are entitled to the fund, all the claimants or pretended claimants, whether called as defenders or not, ought to produce their grounds of debt and diligences thereon, or other interest in the fund, and dispute their preferences thereto; (3) that the pursuer and real raiser (or nominal raiser), as the case may be, should be entitled to retain the expenses of the process, and be decerned and ordained to make payment of what sum remains in his hands, after such retention, to such of the defenders or other claimants as may be found to have the best right thereto; (4) that the defenders found to have no right to the fund *in medio*, and all other persons, should be decerned and ordained to desist and cease from further troubling the pursuer with respect to the premises in time coming. There may also be conclusions for exoneration. Annexed to the summons is a condescendence, in which the circumstances making the action necessary are set forth. Pleas-in-law follow the condescendence.

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[1] *M'Dowall & Neilson's Tr.* v. *Hagart & Co.*, 1905, 8 F. 235.

[2] But see *Lang* v. *Downie*, 1872, 9 S.L.R. 308.

[3] *Richardson* v. *Wilson* (O.H.), 1905, 12 S.L.T. 775; *Nimmo* v. *Murray*, 1863, 1 M. 791.

[4] *Pentland* v. *Royal Exchange Assurance Co.*, 1830, 9 S. 164.

[5] *Anderson* v. *Cameron's Trs.*, 1844, 17 Sc. Jur. 42.

[6] *Provan* v. *Provan*, 1840, 2 D. 298; cf. *Allardice* v. *Lautour*, 1845, 7 D. 362; *Nimmo* v. *Murray, supra.*

[7] *Highland Rly. Co.* v. *British Linen Co.*, 1901, 38 S.L.R. 584.

[8] *Dunn's Trs.* v. *Barstow*, 1870, 9 M. 281; *MacGillivray's Trs.* v. *Dallas*, 1905, 7 F. 733; *Macnab* v. *Waddell*, 1894, 21 R. 827; *Commercial Bank of Scotland* v. *Muir*, 1897, 25 R. 219.

[9] *Ramsay's Judicial Factor* v. *Smith's Trs.*, 1911, 2 S.L.T. 390.

[10] 13 & 14 Vict. c. 36.

SECTION 4.—JURISDICTION.

262. Jurisdiction in a multiplepoinding is created by the existence of the fund *in medio* in Scotland,[1] and any person claiming, or who might lay claim to, the fund may be called as a defender, even though he is not otherwise subject to the jurisdiction of the Scots Courts. Arrestment to found jurisdiction is not necessary in a multiplepoinding.[2] An action of multiplepoinding is competent either in the Court of Session or in the Sheriff Court to whose jurisdiction the holder of the fund *in medio* is subject.[3]

SECTION 5.—BRINGING THE ACTION INTO COURT.

263. A summons in a multiplepoinding is served in the ordinary way, with an *induciæ* of six days, unless there are conclusions for exoneration or other extra conclusions, in which cases the ordinary *induciæ* must be given. In practice a seven days' *induciæ* is allowed in all cases. If the action is raised by a claimant, the summons must be served on the pursuer and nominal raiser in the same manner as if he were a defender.[4] It is not sufficient to intimate the summons to the nominal raiser after the action has been brought into Court.[5] It must be stated in the summons who is the real raiser.[6]

SECTION 6.—CONDESCENDENCE OF THE FUND IN MEDIO.

264. Where the holder of the fund raises the action he should give a condescendence of the fund *in medio* along with the summons, and where a claimant raises the action the holder of the fund should at the first calling of the case give in a condescendence of the different items forming the fund *in medio* in his hands, stating any claim or lien which he has on the fund. If the holder of the fund, who is always the pursuer, fails to put in a condescendence, a claimant may be allowed to do so.[7] If the fund *in medio* is set forth in the condescendence annexed to the summons, the first interlocutor usually contains a clause holding that condescendence as a condescendence of the fund *in medio*. If this is not done, an order appointing the pursuer or other party to lodge a condescendence within a certain time is pronounced; the order also allows parties to lodge objections to the fund *in medio* within a certain time after it is lodged. An amended condescendence of the fund *in medio* may be put in if necessary. Any claimant may object to the condescendence of the fund.[1] When the competency of the action is objected to, or the nominal raiser is to deny the existence in his hands of any fund *in medio*, appearance is entered and defences lodged by the objector. A record is then made up and closed as in any ordinary action, and these points are decided before further procedure. When objections are lodged to the condescendence of the fund *in medio* a record is made up, printed, and closed, on the condescendence of the fund and the objections thereto, and the case is sent to the Procedure Roll to have the objections discussed, or a proof or remit may be ordered, and thereafter the amount of the fund, if any, determined.[2] An interlocutor disposing of the objections and approving of the fund *in medio* can be reclaimed against within twenty-one days without leave.[3] In practice, questions as to the fund *in medio* are often delayed till after the competition has been decided.[4] If the condescendence of the fund *in medio* has been approved and the objections to it repelled, questions as to the fund cannot be raised in a subsequent reclaiming note from an interlocutor in the competition.[5]

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[1] *Mansfield, Ramsay & Co.* v. *Smith, Wright & Gray*, 1795, Mor. 2594; *Cameron* v. *Chapman*, 1838, 16 S. 907; *Bell* v. *Stewart*, 1852, 14 D. 837; *Crockart* v. *Dundee and Arbroath Rly. Co.*, 1852, 15 D. 202.

[2] *Miller* v. *Ure*, 1838, 16 S. 1204.

[3] Sheriff Courts Act, 1907 (7 Edw. VII. c. 51), s. 6 (*g*).

[4] A.S., 11th July 1828, s. 23; C.A.S., C, iv. 3 (*c*).

[5] *Paterson* v. *M'Kenzie*, 1826, 4 S. 822.

[6] 13 & 14 Vict. c. 36, s. 9.

[7] A.S., 11th July 1828, s. 47.

SECTION 7.—DEFENCES.

265. If defences are lodged, the record is made up in the ordinary way. The ordinary defences to the action are: (1) that it is incompetent; (2) that all parties are not called. The latter defence cannot be said to be of much practical importance, for any person may claim in the multiplepoinding, whether he be called or not, and intimation may be ordered either generally by advertisement or on any particular person having interest. Other defences may be taken, such as no jurisdiction[6] or *forum non conveniens.*[7] The defence to the competency of the action raises the question as to whether there is or is not double distress. If there is no double distress the action is incompetent. Where trustees raise an action of multiplepoinding for their exoneration or to have questions decided as to the meaning of trust deeds, double distress is not necessary to its competency,[8] but in one case the Court dismissed an action of multiplepoinding at the instance of trustees for guidance by the Court which contained no conclusions for exoneration. Defences may be stated either by the nominal raiser or by any of the claimants. It is not a good objection to the competency of the action that the nominal raiser has no funds belonging to the common debtor.[1] All objections to the competency must be disposed of before any order is pronounced.[2] A claimant will not be ordained to sist a mandatary till a question as to the competency of the action has been decided.[3]

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[1] *Lang* v. *Reid and Monach*, 1826, 5 S. 21 (N.E. 19); *Donaldson's Tr.* v. *Beattie*, 1914, 1 S.L.T. 170.

[2] *Walker's Tr.* v. *Walker*, 1878, 5 R. 678.

[3] *School Board of Harris* v. *Davidson*, 1881, 9 R. 371; *Walker's Trs.* v. *Walker, supra.*

[4] *Strathallan* v. *Macgregor*, 1847, 19 Sc. Jur. 690; *Ramsay's Judicial Factor* v. *British Linen Bank*, 1912 S.C. 206.

[5] *North British Rly. Co.* v. *Gledden*, 1872, 10 M. 870.

[6] *Miller* v. *Ure*, 1838, 16 S. 1204.

[7] *Okell* v. *Foden*, 1884, 11 R. 906; *French* v. *Hohbach* (O.H.), 1921, 2 S.L.T. 53.

[8] *Paterson's Trs.* v. *Paterson* (O.H.), 1899, 7 S.L.T. 134.

Section 8.—Procedure where no Defences are Lodged.

266. In the event of no defences being lodged, the case may be enrolled after ten days from calling. Either the pursuer or the real raiser may enrol the case. If, as frequently happens, some of the parties who may be interested in the fund *in medio* are unknown to the pursuer, or their addresses are unknown, an order is made for advertisement of the dependence of the action so many times in certain newspapers. This is usually done by interlocutor at the first calling of the case. If no advertisement is necessary, the usual first interlocutor finds the pursuer liable only in once and single payment, and appoints all parties claiming an interest in the fund *in medio* to lodge their condescendence and claims within so many days. The time allowed will vary according to circumstances of each action. No claim can be lodged till an order for claims has been made.[2] After the time for lodging claims under the first interlocutor has expired, a second order for claims is usually pronounced.

Section 9.—Consignation and Exoneration.

267. The pursuer, if he be the real raiser and if he so desires, can get out of the process at an early stage of the proceedings. Whenever the condescendence of the fund *in medio* has been approved of, either by there being no objections or by a final decision as to the amount of the fund, he is entitled to the expenses of raising and bringing the action into Court. He gets decree entitling him to retain the amount of these expenses as taxed, and ordering him to consign the balance of the fund in bank, in name of the clerk of Court, to abide the orders of Court. When consignation has been made, an interlocutor is granted exonerating and discharging the pursuer of the fund *in medio*, and of his whole actings and intromissions therewith. The effect of a decree of exoneration is to relieve the holder of the fund of all responsibility, even though the fund is paid to the wrong creditor in the absence of one who has a better claim.[4] It has been stated that a creditor not cited in a multiplepoinding might have a claim against the holder for his neglect to cite him if the claim were known to the holder.[5] In one case, after decree of exoneration had been granted in favour of the trustees of a deceased person, a creditor put in a claim founded on a debt due by the deceased, but which had prescribed under the triennial prescription. The creditor, having been allowed to prove his debt by reference to the oath of the party, proposed to make a reference to the oath of the trustees, but it was held that reference must be to the oath of the other claimant, as the trustees had been discharged.[1]

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[1] *Crombie* v. *Christian's Trs.*, 1830, 8 S. 745.

[2] *Connell* v. *Ferguson*, 1861, 23 D. 683.

[3] *Clark* v. *Campbell*, 1873, 1 R. 281.

[4] Stair, iv. 16, 3.

[5] Shand, Practice, p. 600.

268. Consignation is often ordered on the motion of a claimant,[2] and may even be ordered on the motion of a riding claimant.[3] In one case the nominal raiser was ordered to consign the alleged fund *in medio*, although he denied that he held any such fund.[4] The raiser cannot be ordered to consign if he have any good claim to the fund.[5] His claim must be liquid.[6] If the holder fails to obey an order to consign, decree of consignation may be obtained against him. Diligence can be used on the decree. If decree of consignation has been granted in the absence of the nominal raiser, diligence may be suspended.[7]

SECTION 10.—CLAIMS.

269. A condescendence and claim is a paper signed by counsel. It may be lodged by any of the parties called as defenders, or by anyone, even although not called, who alleges an interest in the distribution of the fund. The condescendence usually adopts part of the condescendence annexed to the summons, and sets forth any additional facts bearing on the claimant's right to the fund. At the end of the condescendence is a claim which states the portion of the fund *in medio* to which the claimant asserts his right. The claim is essential, as where a condescendence does not contain a claim the claimant cannot be preferred.[8] Pleas-in-law are added after the claim.[9] Leave to amend a claim after decree has become final has been refused.[10]

SECTION 11.—PROCEDURE WHERE THERE IS NO COMPETITION.

270. After the expiry of the time allowed by the second order for lodging claims, if there is only one claim lodged, or if various claimants are agreed as to the proportion in which the fund should be divided, an interlocutor is pronounced for aught yet seen ranking and preferring the claimant or claimants in terms of his or their claims.[11] The interlocutor usually contains also an order for payment, but this does not always follow, as there are cases where it is obvious that the only claims put in could be defeated by claims which might be made by an absent person.[1] Four years after the date of an interlocutor ranking the only claimant to the whole fund for aught yet seen, it was discovered that persons were alive who should have been called, but who had not been called because their existence was unknown. The real raisers lodged a minute of explanation. The Court ordered intimation of the action to the new defenders. They lodged claims and a record of new was made up.[2] An interlocutor for aught yet seen is conclusive against a person called as defender in the action, but a person not called may be reponed against it in certain cases without payment of expenses.[3] This form of interlocutor is not now in frequent use.[4] As to reduction of a decree of preference, see below.[5]

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[1] *Farquhar* v. *Farquhar*, 1886, 13 R. 596.

[2] *Wallace* v. *Campbell*, 1822, 1 S. 509 (N.E. 471).

[3] *British Linen Co.* v. *Breadalbane Trs.*, 1836, 15 S. 356.

[4] *Clow* v. *King*, 1850, 13 D. 132; *Mackenzie* v. *Mackintosh*, 1828, 6 S. 1057.

[5] Shand, Practice, p. 593; *M'Kenzie* v. *M'Kenzie*, 1827, 5 S. 725 (N.E. 676).

[6] *Ewing* v. *Wight*, 1831, 10 S. 109.

[7] *Macleman* v. *Cameron*, 1827, 5 S. 370.

[8] *Connell* v. *Ferguson*, 1861, 23 D. 683.

[9] C.A.S., C, iv. 3 (1).

[10] *Terrell* v. *Ker*, 1900, 2 F. 1055.

[11] *Kerr's Tr.*, 1894, 2 S.L.T. 10; *Gauden's Tr.* v. *Jamieson*, 1902, 10 S.L.T. 326.

271. In some cases an interlocutor is pronounced ordering payment on caution being found for repetition and payment, with interest, of the sum decerned for if any person should appear and make good a preferable claim.[6] In a case where a person, who if alive had a good title to a fund *in medio*, had disappeared and not been heard of for many years, Lord Lee ordered payment to other claimants on caution, and limited the time to thirteen years. Extract was superseded till caution had been found. Caution was not found, and after thirteen years had elapsed Lord Pearson ordered payment to the claimants.[7]

Section 12.—Procedure in Competition.

272. Where several competing claims are lodged there is usually an order on the real raiser to print the condescendences and claims.[8] The Court may appoint one of the claimants to print.[9] The case thereafter appears in the adjustment roll, the record is closed, and ordinary procedure follows. It is not the practice for the different claimants to answer specifically the statements in the condescendences of other claimants, but this may still be done under an order for revisal.[10] A process of multiplepoinding implies all the powers necessary for determining the rights of the parties, and no process of reduction or other action is necessary for setting aside any deed which may be founded on by one of the parties, nor is any process of constitution necessary for establishing any of the claims, the effect of the process of multiplepoinding being such as to authorise the Court to discuss incidentally all such points arising in the course of it as are necessary for extracting the rights of the parties.[11] Every claimant has a title and interest to contest other competing claims.[1] After the case has been heard in procedure roll, or proof taken, an interlocutor is issued repelling the claims of the unsuccessful, and sustaining the claims of the successful, claimants. Sometimes there is an order for payment in the same interlocutor, but it is frequently delayed. An interlocutor preferring one creditor has the effect of an interlocutor repelling the claims of all the rest.[2] It is usual, in interlocutors ranking and preferring claimants, to grant leave to reclaim.[3]

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[1] *Kerr's Tr.*, 1894, 2 S.L.T. 10.

[2] *Gauden's Tr.* v. *Jamieson*, 1902, 10 S.L.T. 326.

[3] *Geikie* v. *Morris*, 1858, 3 Macq. 347, at p. 358; *Johnston* v. *Elder*, 1832, 10 S. 195; *Morgan* v. *Morris*, 1856, 18 D. 797; Maclaren on Expenses, p. 289.

[4] Mackay, Manual, p. 384.

[5] Para. 277, *infra*.

[6] *Union Bank of Scotland* v. *Gracie*, 1887, 25 S.L.R. 61.

[7] *Pullar's Trs.*, 1884 and 1897, n.r.

[8] *Town and County Bank* v. *Lilienfield*, 1900, 8 S.L.T. 227.

[9] A.S., 5th February 1861, s. 8.

[10] 31 & 32 Vict. c. 100, s. 30.

[11] See para. 259, *supra*.

273. Procedure on reclaiming note in multiplepoindings is the same as in ordinary actions. If one claimant reclaims, other claimants may take advantage of his reclaiming note.[4]

Section 13.—Appointment of Factor.

274. Formerly it was the practice to appoint a common agent or factor.[5] He was appointed by the claimants, who were ordained to meet for that purpose by the Lord Ordinary. The duties of the common agent were similar to those of a common agent in a process of ranking and sale. A common agent is rarely now appointed, but it is still competent to have one appointed.

Section 14.—Payment of Government Duties.

275. As the fund *in medio* in a multiplepoinding is *in manibus curiæ*, no order for payment can be made till all Government duties have been satisfied and paid.[6] The Court must be satisfied that this has been done, and may, if necessary, appoint the agent for the party, or, failing him, another agent, to settle the duties with the Inland Revenue. The clerks of Court may not present for the signature of the Lord Ordinary or Court any interlocutor ordering payment until there is lodged with them a certificate by the proper officer of Inland Revenue that all duties have been paid.

Section 15.—Amendment of Claims and New Claims.

276. Claims in a multiplepoinding may be, and often are, amended in view of the judgment of the Court or Lord Ordinary.[7] It is in the discretion of the Court to allow such amendment, or to allow new claims to be received, and to settle on what terms such claims are to be received, if allowed. Leave to amend a claim was refused where a decree on the merits had become final.[1] A person who has not been cited as a defender is generally allowed to put in a late claim on easier terms than one who has been called, but a person waiting to see the result of the competition before putting in his claim will in general have to pay a share of the expenses incurred by other claimants in vindicating his right. Sometimes new claims are allowed to be received on condition of payment of expenses hitherto incurred which would not be available at the future stages of the cause.[2] In one case, where the Court had decided that one of the claimants was not entitled to participate in the fund, another party, who had claimed upon the footing that the unsuccessful competitor was entitled to a share, was refused leave to amend his claim.[3] Where parties who had lodged a claim in a multiplepoinding, and subsequently withdrawn it by minute, moved the Lord Ordinary for leave to withdraw their minute and prove their averments after decree of preference pronounced in the competition had become final, the motion was refused, and on a reclaiming note presented against the interlocutor refusing the minute, it was held that the decree of preference was a decree *in foro quoad* the minuter, and that the reclaiming note did not bring the decree of preference under review.[4] After a decree of ranking and preference had been pronounced a claimant tendered a claim; his interest was the same as those of the successful claimants. The Court allowed his claim to be lodged, he having had no notice of the action, subject to his making a payment to the other claimants of a proportion of the expenses to which they had been put.[5]

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[1] *Dickson and Walker* v. *John Mitchell & Co.*, 1910 S.C. 139.

[2] Shand, Practice, p. 598.

[3] See *Lamond's Trs.* v. *Croom*, 1872, 10 M. 690; *Kennedy* v. *Taylor*, 1873, 11 M. 603.

[4] 31 & 32 Vict. c. 100, s. 52.

[5] A.S., 1828, s. 48; C.A.S., C, iv. 3 (*b*).

[6] C.A.S., B, v.; A.S., 3rd December 1912; 36 Geo. III. c. 52, s. 25; 16 & 17 Vict. c. 51, s. 53; 51 & 52 Vict. c. 8, s. 24 (3); 57 & 58 Vict. c. 30, s. 8 (1).

[7] *Ferguson's Trs.* v. *Hamilton*, 1862, 24 D. (H.L.) 8; 4 Macq. 397.

SECTION 16.—REDUCTION OF DECREES OF PREFERENCE.

277. Though a decree ordering payment to a particular claimant is an absolute discharge to the holder of the fund who has paid in terms of the interlocutor, it is not an absolute decree to the claimant obtaining payment, but may, under certain circumstances, be reduced. If a person was not called in the original action, he may reduce the decree if he can produce a preferable claim. By Act 1584, c. 3, a person, even though expressly called in the multiplepoinding, may bring a reduction of the decree if he can shew a reasonable cause of absence from the original competition; or a person may reduce the decree if at its date he was a minor without tutors or curators.[6] A decree in an action of multiplepoinding is *res judicata* against all the parties to the proceedings in which it is pronounced.[1] A claimant cannot found upon a title which another person had unsuccessfully founded on in a previous process with reference to the same fund.[2]

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[1] *Terrell* v. *Ker*, 1900, 2 F. 1055; *Wilson's Trs.* v. *Clydesdale Bank*, 1900, 8 S.L.T. 29; *Landale* v. *Wilson*, 1900, 2 F. 1047; *Ramsay's Judicial Factor* v. *British Linen Bank*, 1911 S.C. 832, per Lord Mackenzie.

[2] See *Jaffe* v. *Carruthers*, 1860, 22 D. 936; *Sawer's Judicial Factor* v. *Sawers*, 1889, 17 R. 1; *Morgan* v. *Morris*, 1856, 18 D. 797; *Binnie's Trs.* v. *Henry's Trs.*, 1883, 10 R. 1075; *Cowan's Trs.* v. *Cowan*, 1888, 16 R. 7; *Dymond* v. *Scott*, 1877, 5 R. 196; *Cameron* v. *Young*, 1873, 45 Sc. Jur. 272.

[3] *Graham's Tr.* v. *Grahams*, 1868, 6 M. 820.

[4] *Duncan's Factor* v. *Duncan*, 1874, 1 R. 964.

[5] *National Bank of Scotland* v. *Campbell*, 1901, 4 F. 17.

[6] See *Stodart* v. *Bell*, 1860, 22 D. 1092.

SECTION 17.—RIDING CLAIMS.

278. The creditors of a claimant may claim to be ranked on the fund, or portion of the fund, to which their debtor may be found entitled. The creditor's claims are called riding claims. Where there are several riding claims on one original claim, and the amount found due to the original claimant is not sufficient to pay the riding claimants in full, the competition among the riding claimants is conducted as an ordinary multiplepoinding. The riding claim is not admitted unless the debt is liquid and constituted.[3] A riding claim should be lodged before the original claimant has obtained decree for payment,[4] but it may be received after judgment of ranking and preference in the Inner House.[5] A creditor has no title to claim, in a multiplepoinding, funds to which his debtor has right, except by way of a riding claim upon a claim lodged by his debtor.[6] The interlocutor on a riding claim finds the original claimant entitled to be ranked *primo loco* on the fund *in medio* in terms of his claim; but in respect of the claim for the riding claimant as a rider on the claim of the original claimant, ranks and prefers the riding claimant upon the fund *in medio* in room and place of primary claimant, and as a rider upon his claim.

SECTION 18.—MULTIPLEPOINDING FOR EXONERATION OF TRUSTEES.

279. The process of multiplepoinding is the common mode by which trustees seek to obtain judicial exoneration. They do not require to allege actual double distress to entitle them to bring the action.[7] Wherever there are difficult questions as to the disposal of the trust estate, or reasonable doubt as to the true construction of the trust deed, or where its validity is called in question, the trustees are entitled to raise a multiplepoinding. If extrajudicial exoneration is refused to the trustees by the beneficiaries, or if the trustees, or any of them, had a claim on the estate which the beneficiaries disputed, the trustees would be entitled to raise a multiplepoinding.[8] Trustees may also raise the action where they are bound to distribute the estate within a fixed period and are uncertain to whom payment should be made;[1] or where the trust has lasted for a very long time.[2]

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[1] *Elder's Trs.* v. *Elder*, 1895, 22 R. 505.

[2] *M'Caig* v. *Maitland*, 1887, 14 R. 295.

[3] *Home's Trs.* v. *Ralston's Trs.*, 1834, 12 S. 727; *Royal Bank of Scotland* v. *Stevenson*, 1849, 12 D. 250; *Wilson* v. *Young*, 1851, 13 D. 1366.

[4] *Anglo-Foreign Banking Co.*, 1879, 16 S.L.R. 731.

[5] *Scottish Life Assurance Co.* v. *John Donald, Ltd.*, 1902, 9 S.L.T. 348; *Ramsay's Judicial Factor* v. *British Linen Bank*, 1911 S.C. 832, per Lord Mackenzie.

[6] *Gill's Trs.* v. *Patrick*, 1889, 16 R. 403.

[7] *Taylor* v. *Noble*, 1836, 14 S. 817; *Mackenzie's Trs.* v. *Sutherland*, 1895, 22 R. 233; *Davidson* v. *Ewen* (O.H.), 1895, 3 S.L.T. 162.

[8] *Blair's Trs.* v. *Blair*, 1863, 2 M. 284.

280. A narrower view of the right of trustees to raise a multiplepoinding was taken by the Court in a recent case. Where trustees apprehend trouble in administering the estate in future, they are not entitled on that account alone to end their administration by raising a multiplepoinding, more especially where they do not allege that the beneficiaries refuse to grant them an extrajudicial discharge. A multiplepoinding was brought by trustees who were in course of distributing the estate, in which they called the beneficiaries and a creditor whose claim against the estate was objected to by certain of the beneficiaries; the action was held incompetent, and expenses were awarded against the trustees as individuals.[3] Testamentary trustees raised an action of multiplepoinding for distribution of the estate under their charge and for exoneration, in which a creditor who claimed the whole trust funds and the beneficiaries under the will were called as defenders; the creditor sought to enforce his claim by direct action against the trustees; no questions were raised among the beneficiaries *inter se*; the multiplepoinding was held incompetent in respect that the claim of the creditor and the claims of the beneficiaries were not truly competing claims, not being of the same class, and that the creditor was not delaying to constitute his claim against the trust estate.[4] But if the creditor will neither abandon his claim nor constitute it, trustees may be entitled to raise a multiplepoinding for their exoneration.[5] When trustees under a testamentary deed bring an action of multiplepoinding to have a question which has been raised as to its validity determined, it is their duty to lodge a claim, as trustees, for the whole fund for the purpose of administration.[6] Where trustees raised an action to obtain the guidance of the Court in their administration of the trust estate, the action was dismissed as incompetent, there being no conclusions for exoneration.[7]

281. It is competent for a creditor to raise an action of multiplepoinding and exoneration in name of the trustees on whose estate he is a creditor, provided the trustees in whose name it is raised adopt it as their own.[8]

282. Although where there are competing claims a judicial factor is not precluded from bringing an action of multiplepoinding, it is incompetent for him to raise a multiplepoinding merely for his own exoneration.[9] But a multiplepoinding may be brought in the factor's name as nominal raiser by one of several competing claimants,[1] and he may obtain exoneration in the process.

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[1] *M'Dougal's Trs.* v. *M'Dougal*, 1830, 8 S. 1036.

[2] *Dunbar* v. *Sinclair*, 1850, 13 D. 54.

[3] *Mackenzie's Trs.* v. *Sutherland*, 1895, 22 R. 233; cf. *Connell's Trs.* v. *Chalk*, 1878, 5 R. 735.

[4] *Glen's Trs.* v. *Miller*, 1911 S.C. 1178.

[5] *Blair's Trs.* v. *Blair*, 1863, 2 M. 284; *Glen's Trs.* v. *Miller*, *supra*, per Lord Johnston.

[6] *Hall's Trs.* v. *Macdonald*, 1892, 19 R. 567.

[7] *Paterson's Trs.* v. *Paterson*, 1899, 7 S.L.T. 134.

[8] M'Laren on Wills, p. 1164; *Jamieson* v. *Robertson*, 1888, 16 R. 15.

[9] *Campbell* v. *Grant*, 1870, 8 M. 988.

SECTION 19.—EFFECT OF MULTIPLEPOINDING ON DILIGENCE BY CLAIMANTS AND OTHERS.

283. When an action of multiplepoinding has been raised, no person who has claimed, or even appeared in the action, is entitled to use personal diligence against the holder of the fund, the object of the action being to suspend diligence.[2] If a party has not appeared, but has been cited, the holder of the fund can obtain a suspension of diligence by him. Whenever a multiplepoinding is raised, the fund becomes litigious, and the holder is barred from granting any voluntary conveyance of it. On the other hand, the claimants or creditors must use all proper diligence to attach or acquire preference over the fund *in medio*. A claim in a multiplepoinding has in itself no effect. The multiplepoinding does not supersede the necessity for diligence.[3] If a creditor is not a party to the multiplepoinding he may, if the subject be poindable, proceed to carry off the fund *in medio* by poinding,[4] and also even if he is a party to the multiplepoinding.[5] Where a process of multiplepoinding has been raised in consequence of an arrestment, it will save the arrestment from prescription, though no claim be lodged within the prescriptive period.[6] If no procedure takes place in a multiplepoinding for the prescriptive period, claims founded on arrestments will fall by prescription.[7]

SECTION 20.—EXPENSES.

284. Where the competency of the multiplepoinding has been sustained the expenses of the real raiser are always given out of the fund *in medio*.[8] This rule was applied on the principle that the holder of the fund on which double arrestments had been used was entitled for his safety to raise the action, and to be relieved of expense connected with it. It has been extended to multiplepoindings raised by a claimant. In one case where a multiplepoinding was found competent but where one of the claims appeared to be obviously ill-founded, it was observed that a party should not be allowed to reduce the fund *in medio* by making a claim which was totally unsound but which justified the raising of a multiplepoinding. "There have been cases in the past, and may be again in the future, where the expenses of a multiplepoinding, rendered necessary by an unreasonable claim, are imposed on the persons lodging such a claim, and in which no part of the expenses of the cause, even those for bringing it into Court, are put on the party so bringing it."[1] The nominal raiser is also entitled, out of the fund *in medio*, to his expenses. Where it is held that a multiplepoinding is incompetent, expenses are given against the raisers.[2]

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[1] *Tait's Factor* v. *Meikle*, 1890, 17 R. 1182.

[2] *White* v. *Brown*, 1772, Mor. 9133.

[3] *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142, at p. 1163.

[4] Bell's Com. ii. 279.

[5] *Ferguson* v. *Bothwell*, 1882, 9 R. 687.

[6] *Thomson & Ainslie* v. *Simpson*, 1774, Mor. 11049.

[7] *Graham* v. *M'Farlane*, 30th May 1811, F.C.

[8] *Hepburn's Tr.* v. *Rex*, 1894, 21 R. 1024.

285. The ordinary rule that expenses follow the result is applied to claimants in a multiplepoinding. An award to a claimant in general terms covers the expense of lodging his claim.[3] Where a dispute arose in a multiplepoinding as to who were next-of-kin, it was averred that the parents of certain claimants had never been married, and accordingly that the claimants were illegitimate. A proof was allowed and taken on this question. It was held (1) that the claimants' parents were married, and (2) that no part of the expenses of the proof should be charged against the share due to the claimants whose legitimacy had been impugned.[4] An unsuccessful reclaimer was allowed his expenses out of the fund *in medio* on the ground that the questions had been raised by the testator's want of clearness in his testamentary writing, and were of so intricate a character as to have made a reclaiming note justifiable.[5] The subject of expenses of claims received at a late stage in the case has already been considered.[6]

286. Where questions of difficulty as to the meaning of ambiguously worded deeds have been tried in a multiplepoinding, the expenses of all parties have been frequently given out of the fund *in medio*.[7] But there is no inflexible rule to this effect, and in some cases expenses out of the fund have been refused.[8] Unsuccessful reclaimers have been allowed expenses in the Inner House.[9]

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[1] *Pollard* v. *Galloway & Nivison*, 1881, 9 R. 21, per Lord Young.

[2] *Mackenzie's Trs.* v. *Sutherland*, 1895, 22 R. 233.

[3] *Clydesdale Bank* v. *Gardiner* (O.H.), 1906, 14 S.L.T. 236.

[4] *Cochran* v. *Purves* (O.H.), 1908, 16 S.L.T. 42.

[5] *Gibson's Trs.* v. *Wilson*, 1899, 1 F. 1016.

[6] See para. 276, *supra*.

[7] *Costine's Trs.* v. *Costine*, 1878, 5 R. 782; *Rennie's Tr.* v. *Watt*, 1904, 12 S.L.T. 414; *Gibson's Trs.* v. *Wilson*, *supra*.

[8] *Moram* v. *Ford*, 1867, 5 M. 353, per Lord Justice-Clerk; *Miller's Trs.* v. *Kirkaldy* (O.H.), 1905, 13 S.L.T. 474; *Bannerman's Trs.* v. *Bannerman*, 1915 S.C. 398.

[9] *Gibson's Trs.* v. *Wilson*, *supra*.

MULTURES.

See THIRLAGE.

MUNICIPAL ELECTIONS.

See FRANCHISE AND ELECTION LAW.

MUNUS PUBLICUM.

See OFFICE.

MURDER.

See CRIME.

MUSICAL COMPOSITIONS.

See COPYRIGHT.

MUSICAL INSTRUMENTS.

See CUSTOMS AND EXCISE.

MUSSELS.

See FISHINGS.

MUTINY.

See ARMED FORCES OF THE CROWN.

MUTUAL GABLE.

See COMMON GABLE.

MUTUUM.

See LOAN.

NAME AND CHANGE OF NAME.

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SECTION 1.—INTRODUCTORY.

287. Jurisdiction in matters of name and change of name in Scotland is exercised by the Lord Lyon King of Arms, who has both a statutory [1] and pre-statutory [2] jurisdiction in this matter. The Court of Session has occasionally been invoked, but in a recent case the Lord President observed, "From the first, I felt have great doubt whether the Court has any proper jurisdiction in the matter," and referred the petitioner to Lyon.[3] In England, the corresponding jurisdiction in questions of name is exercised by the Earl Marshal through the Kings of Arms and the Heralds College. To them English Royal licences are directed, just as Scots Royal Licences are to the Lord Lyon: "to whom cognisance of matters of this nature doth properly belong"—as the warrant declares.

288. In relation to population there are relatively fewer surnames in Scotland than in England. The clan system, whereby individuals were induced to adopt the patronymic of the clan they joined, has contributed to this, and the super-imposition of feudal customs on a Celtic organisation has led to various picturesque combinations of nomenclature not found in other countries.[4]

SECTION 2.—CHRISTIAN NAMES.

289. The name conferred at baptism is, strictly speaking, the individual's only proper name, and in early times was considered immutable.[1] In Scotland, a person may assume a new "baptismal" or "forename,"[2] and such a change has received official recognition in Lyon Court.[3] There are, in this country, no restrictions on choice of Christian name (except rank-indexes, at least in positions where these indicate "names of dignity," which may not be taken without the Sovereign's consent,[4] *e.g.* "*Lord* John Sanger" could not be registered in Scotland). The Roman Catholic Church requires one of the names to be that of a saint in the Roman Calendar, and in England proceedings were threatened against a clergyman who refused to christen a child "Beelzebub."[5] Since a child has neither name nor surname at birth,[6] registration of these depends on whether they have been given or acquired,[7] and a name may be given, or any "name" (here meaning baptismal or "forename") already registered may be altered, virtually at the discretion of parent or guardian,[8] and the entry amended if done within six months of birth, but after this period only by warrant of the Sheriff.[9] The Act places no limit to a period within which the "child's" forename may be altered by warrant of the Sheriff, but "child" infers that alteration must be made before majority.

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[1] 30 & 31 Vict. c. 17, Schedule B.

[2] Public Register of Birthbriefs (at large); J. H. Lorimer, Handbook of the Law of Scotland, 2nd ed., p. 445.

[3] *Forlong*, 1880, 7 R. 910.

[4] Gen. David Stewart, The Highlanders of Scotland, pp. 26, 101, App. xxxv.

SECTION 3.—SURNAME.

290. This term is derived from "surnom" or additional name, not "sirename." Until lately, surnames were not considered hereditary, and are essentially descriptions of identity.[10] The standard rule in Scotland is[11] that the surname of an individual is "the name by which he is at the time called and known, which he uses in his contracts and transactions with the public, and by means of which, as a sufficient designation of him, his identity is rendered indisputable."[2] Surnames are therefore a matter of repute, or the description by which the party is known amongst his neighbours and to which he himself answers.[12]

291. Some surnames are descriptive of personal characteristics, others of trade, profession, or parentage, but the earliest fixed surnames have been territorial. In the Middle Ages, and in some districts until late in the nineteenth century,[13] fixed surnames were hardly required, except in the upper classes. His Majesty's family possessed none until "Windsor" was assumed by proclamation on 17th June 1917, and that name is shared with Lord Portsmouth's family. When a Christian name was not sufficient, a landed man was designed "of his lands." [1] Successive generations held the lands, and used the same description, and this unconsciously became the surname of the family.[2] In a feudal country like Scotland the laird was called by his fief, and had to answer, or was fined, by the name of his fief alone.[3] Frequently, however, such names were applied to those who had been born at or came from the locality, *e.g.* John of Fordoun and William de Wynton, and it was the practice to assign such names at pre-Reformation ordination.[4] In other cases, the personal name has become applied to an erected territorial domain, such as the regality of Grant, of which the nucleus was the barony of Freuchie.

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[1] Seton, Law and Practice of Heraldry, p. 399.

[2] *Kinloch* v. *Lourie*, 1853, 16 D. 197, per Lord Cowan at p. 200.

[3] *Sir Alexander Logie Elphinstone of Glack, Bart.*, 4th April 1928, Lyon Register, xxvii. 79.

[4] "*Sir* Morell Mackenzie," Gretna Parish, November 1929, see "Bulletin" Report; *cf.* paras. 294, 298, *infra*.

[5] A. C. Fox-Davies and Carlyon-Brittain, Law of Name and Change of Name, p. 11.

[6] *Ibid.*, p. 6.

[7] 17 & 18 Vict. c. 80, Schedule A.

[8] *Ibid.*, s. 33, and Schedule E.; *Kinloch* v. *Lourie, supra*.

[9] 17 & 18 Vict. c. 80, ss. 32, 33.

[10] J. H. Stevenson, Heraldry in Scotland, chap. xiv. p. 364.

[11] Bell, Convey. i. 213, quoting Lord Cowan.

[12] Cf. *Earl Cowley* v. *Countess Cowley*, [1901] A.C. 450.

[13] Cosmo Innes, Some Scottish Surnames, p. 24; Heraldry in Scotland, p. 364.

292. In Scotland many families had two surnames, one common to the whole clan—as Macdonald, Macleod, etc.—the other to distinguish a branch, which last was called the *bun sloinn* or "genealogical surname," and was taken either from the Christian name, territorial designation, or some personal characteristic of the first man of the branch who came off the original family.[5]

SECTION 4.—CELTIC PATRONYMICS.

293. Celtic love of genealogy produced surnames in the nature of a family pedigree, describing the individual as "John, son of Charles, son of Alexander." [6] Such names ("Mac," "O'," and "Vich," or "Mhich") are characteristic of Highland Scotland, Ireland, and Wales (where the English government spared no pains to extinguish the system).[7] A typical highland patronymic is that under which Hector M'Alester of Loupe received a charter early in the seventeenth century, viz., "Hector M'Gorry-vic-Eachine-vic-Allister-vic-Ean-Dubh." [8] Abbreviation of this system evolved the patronymics of chiefs and chieftains, such as MacCaillein Mor (Duke of Argyll), MacAonghais an Duinn (Campbell of Dunstaffnage), MacIain Stiubhairtach (Stewart of Appin). The chief of a clan was known simply as "Maclachlan" or "Macleod." The celebrated Gaelic charter by the Lord of the Isles [9] commences, "I, Macdonald, grant and give." [10] Nevertheless, the terms of the (traditional) Kilmahunaig charter, "I, Donald of Donald, sitting on Dundonald," [11] suggest an early resort to the form which produced the well-known style "of that ilk." The prefix "The" nowadays attached to the names of certain Highland chiefs appears to be really of lowland origin, where designations such as "Le Graham," "Le Lindsay" are found in the fourteenth-fifteenth century. The first Highland example is "The Chisholm" (An Siosalach), and it is significant that the family came from Roxburghshire. In Norse districts a similar system of patronymics existed but without the Celtic amplification, *e.g.* the son of John Ranaldson is Laurence Johnson and his son Charles Laurenson.[1]

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[1] Law of Name and Change of Name, p. 16.

[2] *Ibid.*, p. 17 ; Sir George Mackenzie, Works, ii. 615.

[3] Aberdeen Sheriff Court Records, New Spalding Club (at large).

[4] Seton, Law and Practice, p. 381.

[5] Gen. David Stewart of Garth, The Highlanders of Scotland, p. 26, and App. xxxv.

[6] *E.g.* Scot. Rec. Soc., Inventory of Testaments, Commissariots of Argyll and Inverness.

[7] Law of Name and Change of Name, p. 28 ; Statutes (at large), Ireland, 1786, i. 29.

[8] Burke's Landed Gentry, 1914.

[9] 6 Beltane (May) 1408.

[10] Scottish National MSS., ii. 59.

[11] *Ibid.*, p. 14.

Section 5.—Names of Addition.

294. There are certain words or names of addition which, although not exactly "names," are so for practical purposes, being, in law, "necessary additions." Such are the prefix "Sir," and the description "Knight" or "Baronet," which are expressly made part of the name.[2] In England it is laid down that as additions they shall be inserted,[3] and an error of description such as "Knight" instead of "Baronet" may vitiate proceedings.[4] In Scotland they are actually part of the name of the person on whom they are conferred.[5] Knighthood is the lowest title of dignity, "Esquire" being only a "name of worship." [6] These "additions" are within the Crown's prerogative, and cannot be assumed or entered in any register or official document without authority.[7] Persons must be able to demonstrate they have the Crown's authority before taking them into their "name."

295. Territorial designations in Scotland seem midway between "names" and "additions," but, unlike arms, can be assumed without the Crown's authority; [8] they are one form of the *bun sloinn* or genealogical second surname.[9]

Section 6.—Titles and Names of Dignity.

296. A title of dignity is "parcel of the name." [10] In the peerage, Christian name and title of dignity is full and sufficient description, without any surname.[11] In Scotland, such description is also sufficient, but surname is frequently included as well as the title of dignity, and where a knighthood or baronetcy exists, "Sir" is prefixed to the peer's Christian name.[12] A Scots peer at his creation was (from the middle of the fifteenth century, when dignities received names) solemnly "named" of the dignity: "*creavit nominavit et ab heraldis nominari fecit.*" [1]

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[1] F. J. Grant, Zetland County Families.

[2] Gordon, afterwards "of Gordonstown," 28th May 1625; Douglas Baronage, p. 11.

[3] Hawkins, Pleas of the Crown, chap. xxiii. s. 104.

[4] *Ferrers,* 1612, William Jones Reports, p. 346.

[5] Stewart of Luthrie, 20th February 1567–8, xxxvii. 44; Lindsay of Annatland, 8th August 1620; Stevenson, Heraldry in Scotland, p. 451.

[6] Hawkins, Pleas of the Crown, chap. xxiii. ss. 103, 104.

[7] "*Sir* Morell Mackenzie" refused, by Registrar General (Parish of Gretna, November 1929, "Bulletin" Report; Order in Council, 5th March 1910—"Baronet").

[8] Sir George Mackenzie, Science of Heraldry, chap. xxi. (Works, ii. 616.)

[9] Stewart, Highlanders of Scotland, pp. 26, 101.

[10] Foster, Crown Cases, p. 81; *Dickie* v. *King's Advocate* (Lord Forbes of Pitsligo), 1749, Mor. 4155.

[11] Hawkins, Pleas of the Crown, chap. xxiii. s. 103.

[12] Gordon Peerage Proceedings, p. 407, per Lord Phillimore.

297. Official titles such as Lord Justice-Clerk, Lord Lyon King of Arms, Lord Provost, do not confer any title on a wife,[2] and the recently self-assumed style of "Lady Provost" by the relatives of Lord Provosts has received no official recognition, and is presumably illegal.[3] By Royal Warrant of 3rd February 1905, the wives of Lords of Session are permitted to bear the title "Hon. Lady" and retired judges to retain their judicial titles.

298. Peers and Bishops [4] are alone permitted to subscribe by their titles.[5] Peeresses prefix their Christian name to the title. Heirs, apparent or presumptive, of Scots peerages hold the substantive title of "Master" (itself a dignity), which in the seventeenth century was included in the Patent.[6] "Master" may be a courtesy title in the grandsons of Scots Earls.[7] The daughters of Scots peers bear the prefix "Dame" or "Lady" as a substantive title, whereas this is only a courtesy title in the English peerage. In England, a person who for any reason ceases to be a peer or peeress may apparently retain the title as a "name," [8] but the name "Baronet" is an exception.[9] In Scotland, no one may bear a "name of dignity," *i.e.* rank-index, in such a form as to hold out, or lead to the belief, that the King has conferred such dignity, without such person being able to qualify a right to such name of dignity in the appropriate manner,[10] and the *Cowley* decision would be impossible. The heirs of a forfeited Scots peer may retain the *nomen dignitatis*, but not the rank-index, *e.g.* the heirs of the Earls of Seaforth are styled "Stewart-Mackenzie of Seaforth," without the title of Earl. "Bishop" is not a *nomen juris* in Scotland, and may not be used as a title,[11] but the term is admissible as a description of profession or occupation.[12] "Abbot" continued in use after the Reformation,[1] and has never been statutorily abolished.

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[1] Lord of the Isles, 1st July 1476, Acts, ii. 113; Lords Drummond, etc., 11th January 1487, Acts, ii. 181.

[2] Mackenzie, Works, ii. 551.

[3] *Synod of Aberdeen* v. *Milne's Trs.*, 1847, 9 D. 745, at p. 748.

[4] Bishops are now obsolete, *Drummond* v. *Farquhar*, 6th July 1809, F.C.

[5] Act, 1672, c. 47; Acts, viii. 95.

[6] E.g. *Dignitatem Magistri de Forrester*, Great Seal, 5th July 1651; Riddell, Peerage Law, p. 124.

[7] Master of Berriedale, Scots Peerage, ii. 343, Privy Council (2nd Series), v. 388; Master of Carnegie, per opinion of J. H. Stevenson, K.C., "Scotsman," December 1929; Master of Glamis, Burke's Peerage.

[8] *Earl Cowley* v. *Countess Cowley*, [1901] A.C. 450, but compare "*Marquess of Carmarthen*" (9 Geo. III.), Salkeld's Reports 451.

[9] Order in Council, 5th March 1910.

[10] "Lord Jedburgh," 2nd December 1613, Privy Council, x. 181; Riddell's Peerage Law, p. 242; "Lord Provost," *Synod of Aberdeen* v. *Milne's Trs.*, 1847, 9 D. 745, at p. 748; "Earl of Mar," *Goodeve Erskine* v. *Earl of Kellie*, 1873, 11 M. 876, and printed papers per Lord Pres. Inglis; "Baronet," Scots Privy Council, 2nd ser., iii. 393, and Order in Council, 5th March 1910; "*Sir* Morell Mackenzie," Gretna Parish Registrar, 28th October 1929, "Bulletin," November 1929.

[11] *Drummond* v. *Farquhar*, 6th July 1809, F.C.

[12] *Chisholm*, 6th March 1902, Lyon Register, xvi. 78; *Reid*, 7th June 1929, Lyon Register, xxviii. 40.

SECTION 7.—HERALDIC NAMES.

299. The titles of H.M. Officers of Arms (Lord Lyon, Rothesay Herald, Unicorn Pursuivant, etc.) are legally "names" conferred by the Crown upon the individual, and not merely names of office. They effectively distinguish one specific individual, so charters to these officers under their titles alone are adequate.[2] But the Crown never addresses its servants as "Lord." In a Crown writ the Lord Lyon is styled "Our Lyon, King of Arms," just as the Lord Advocate is styled "Our Advocate." The concluding clause of the Act 1672, c. 47, preserves the heraldic officers' right to subscribe by their titles only, an ancient practice [3] still used in Lyon Office and the Heralds College. On most other occasions the ordinary signature is (for convenience) prefixed to the heraldic name. In England there has been judicial determination that these heraldic titles are names,[4] and a civil action has been dismissed from omission of the words "Clarencieux King of Arms," which "words" were held to be part of the name.[5]

SECTION 8.—TERRITORIAL TITLES OR DESIGNATIONS.

300. The territorial designation so frequently used by representatives of Scots "Houses," their wives, heirs, and daughters (and apart from ownership of the estate) originated—like the principal surname—from possession of land, but is really a form of the *bun sloinn* or genealogical surname. The secondary designation was already recognised, like a peerage *nomen dignitatis*, as "part of the name" in the fifteenth century,[6] and was so regarded by the Crown in the sixteenth and seventeenth centuries.[7] The Statute 1672, c. 47, did not, as sometimes supposed,[8] institute or authorise these territorial titles, but recognised their existence as a form of "title," and prescribed a specific signature, viz., the Christian name and surname with the territorial designation of the lands "adjected," prefixing the word "of" to the said "designation." [9] The contemporary view, shewn by the earlier entails, was that a surname with designation so adjected constituted one name.[10] Later entails usually specify "name and designation," or "name and title."[1] The Lord Advocate in the eighteenth century adhered to the view that "where ordinarily used" they are simply "names," and that if a person is attainted by the name "John Cameron of Lochiel" he must be pardoned by a name consisting of these same words, and the Court sustained this.[2]

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[1] *E.g.* Sir Thomas Hay of Park, Abbot of Glenluce, 8th May 1584, Great Seal, v. No. 693.

[2] Exchequer Rolls, viii. 502.

[3] *E.g.* Calendar of Documents relating to Scotland, iv. No. 1421; Rymour, Fœdera, xi. 836.

[4] *Brooke, York Herald* v. *Garter Dethick* (Hilary, 39 Elizabeth), Leonard's Reports, p. 249.

[5] *Holt* v. *Knox Ward*, Clarencieux (Michaelmas, 3 Geo. II.), Noble, History of the College of Arms, p. 381, quoted in *Dickie* v. *King's Advocate*, 1749, Mor. 4155.

[6] Fotheringham of Powrie, Ross of Mountgreinan, Acts, ii. 194; Herries of Terreglis, 1567, Acts, ii. 558.

[7] Lindsay of the Mount, 1592, Great Seal, xxxvii. No. 469; Lindsay of Annatland, 1620, Heraldry in Scotland, ii. 451.

[8] W. P. W. Phillimore, Index of Changes of Name, p. 30.

[9] 1672, c. 47, Acts, viii. 95.

[10] 1695, Crawfurd of Auchinames, Register of Entails, i. 173; Hope of Craighall, *ibid.*, v. 248.

301. Non-territorial names such as "Mackintosh of Mackintosh," "Macdonald of Clanranald," were evolved principally in the seventeenth century (but earlier instances are found, *e.g.*, in the Kilmahunaig charter),[3] since "Mackintosh" or "Mackintosh of Dunauchtan" did not connote chiefship in the Lowlands, where chiefs bore titles such as "Anstruther of that Ilk." There is some evidence that in Scots (as in French) Law, "adding to" a name differs from "altering it"[4] and that the "adjection" of these titles to the surname is not regarded as a "change" of the former, probably because the basic name is not altered, but merely further defined.[5] Use of these titles forms a condition of entails to which obedience is required,[6] but their use infers that a writ may be validly served at the "place" (if any) indicated, where the user will be deemed to have a residence.[7] Their use has, like analogous Welsh and Irish names,[8] been resented in England —even in the seventeenth century[9]—but they are admitted officially where used not merely as descriptions of ownership but actually as names.[10] Their use as such was, however, recently the subject of official question,[11] but has been sustained in Lyon Court, and they are now, like any other name (*e.g.* "Champion de Crespigny" or "Holmes a Court"), recognised as admissible,[12] and where ordinarily used are officially recognised as surnames, irrespective of the ownership of the lands from which they are taken.[13] Similarly, in a discussion on the import of the term "of that Ilk," Viscount Dunedin observed, "It would quite well apply to land, but also equally apply if there was no land."[1] The family use of these "titles" is normally confined to the eldest son or grandson,[2] wife,[3] and daughters,[4] of the "house," Scots sentiment favouring that younger sons shall sink into the body of the clan or family, or found a house of their own.[5]

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[1] Monro of Allan, 1862, Register of Entails, xxv. 334; *Moir of Leckie*, 1794, Mor. 15537; *Eliot of Stobs*, 1803, Mor. 15542.

[2] *Cameron* v. *King's Advocate*, 1749, Mor. 4161; *Macpherson* v. *King's Advocate*, 1749, Mor. 4160.

[3] Scottish National MSS., ii. 14.

[4] *Robertson*, 1899, 2 F. 127.

[5] *Cf.* Seton's Law and Practice of Heraldry, pp. 411 and 414; Stewart, Highlanders of Scotland, p. 26.

[6] *Moir of Leckie, supra.*

[7] *Montgomery* v. *Laird of Fergushill*, 1632, Mor. 3749; *Creditors of Creighton of Castlemains* v. *H.M. Cashkeeper*, 1684, Mor. 3750.

[8] Law of Name and Change of Name, p. 28.

[9] Campbell of Lawers, 1658, Heraldic Exhibition Catalogue, No. 63.

[10] *E.g.* Campbell of Glenlyon, 1692, Order for Massacre of Glencoe (Scottish National Memorials, vol. xvii.); Commissions, Campbell of Carrick, 1725, Campbell of Skipness, 1727; H. D. MacWilliam, A Black Watch Episode, p. 4; Cameron of Lochiel, Burnett of Leys, Army List, 1929.

[11] Maclean of Ardgour, Register of Births, 1924.

[12] Wolrige-Gordon of Hallhead, Ellon, Par. Reg. (Births), September 1928. Maclean of Ardgour, *supra* (objection withdrawn by Registrar-General, 28th March 1930); Innes of Learney, Edinburgh (St. Andrew's) Reg. of Births, 1930, No. 226.

[13] *Macpherson of Cluny*, 1749, Mor. 4160; *Cameron of Lochiel*, 1749, *ibid.*; *Macdonald of Clanranald*, 1751, Mor. 4162; *Seton of Abercorn*, 20th April 1915, Lyon Register, xxii. 58; *Macneil of Barra*, 20th May 1915, *ibid.*, xxii. 60; *Innes of Learney*, 27th March 1930, Public Reg. of Genealogies, iii. No. 9; *Mackenzie-Inglis of Glencorse*, April 1930, Lyon Register, xxix. 10.

SECTION 9.—PROSCRIBED NAMES.

302. In *Cameron of Lochiel's* case the Lord Advocate observed, "People lose their rights by a forfeiture, but not their ordinary names," yet on two occasions surnames have been proscribed by Act of Parliament in Scotland. "Macgregor" was abolished by Act of Council, 3rd April 1603, which ordained the victims to "tak thame sum other name,"[6] whilst another Act, subsequent to the Gowrie Conspiracy, ordained that the surname of "Ruthven" "sall now and in all tyme cuming, be extinguisht and aboleissit for evir," and that the Barony and place of Ruthven be renamed "Huntingtower."[7] This was relaxed by the Act 1641, c. 210.[8] In England, statutes have principally been directed to forcing Welshmen and Irishmen to assume English surnames and to discontinue their native patronymics,[9] but these statutes did not prove effective, and a Bill to enable Irishmen to assume the surnames "O," "and Mac" was pronounced unnecessary by the Attorney-General.[10] Whilst a person may be astricted (under entail) to assume a specific name, or name and designation, it seems also competent to contract that a person shall refrain from bearing a certain name. In the disposition by Macdonell of Glengarry, of the estate of Glengarry, it is provided that neither the disponee nor his successors shall take the name or title of "Glengarry," meaning as part of a name, not merely as describing the "heritable proprietor of the estate of Glengarry."[11]

SECTION 10.—INHERITANCE OF NAMES, AND CHILDREN'S NAMES.

303. Where the Crown, as fountain of honour, has conferred a name of dignity, with heritable destination, this necessarily imposes the name successively upon each individual falling within the terms of the grant. In other cases, notwithstanding a modern popular belief to the contrary, it seems impossible to reconcile a theory of inheritance of surnames with the legal facts and fundamental nature of a surname, viz., the description by which an individual is generally known.[1] It has been said that, at birth, a child has no surname, and registration [2] or other publication of its name is no more than the commencement of a repute which subsists until upset by some overt act.[3] Mr Fox-Davies has suggested that names are an "estate of inheritance" acquired by a title, analogous to customary or copyhold tenure of English real estate.[4] In Scotland there is no such tenure [5] nor other satisfactory legal grounds upon which such a theory can be based, and the only explanation consistent with historical facts, statutes, and judicial decisions is that each *capax* takes such name as he desires, and that pupils do likewise, through their guardians and tutors-at-law. The statutes which deprived the Ruthvens and Macgregors of their surnames gave the victims no others, but ordained them to "tak thame sum other name," [6] and to "tak to thameselves, thair bairnes, and posteritie, ony uther honest and undefamit surname." [7]

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[1] Gordon Peerage, 1929, Proceedings, p. 427.

[2] Mackenzie, Works, ii. 490; Lord Lyon G. Burnett, The Family of Burnett of Leys, p. 41; *Macpherson* v. *King's Advocate*, 1749, Mor. 4160.

[3] Balfour, Heraldic Tracts, xviii. No. 72; Mackenzie, Works, ii. 551; Official Account of the Royal Visit, 1822, p. 170.

[4] Official Account, *supra*; Maclean of Ardgour, Register of Births, 1924.

[5] Younger sons in some families do bear the title, *e.g.* Macleod of Macleod; Burnett of Leys (3rd son, 1659). See The Burnett of Leys, p. 66. Innes de Leuchars (son of 4th son, 1654), Records of Scots College, p. 41; Carnegy de Balinhard, Royal Licence, 1832. *Macdonald of Clanranald* v. *King's Advocate*, 1751, Mor. 4162, at p. 4163.

[6] Privy Council, vi. 138.

[7] Acts, iv. 213.

[8] Ratification to the House and Family of Ruthven of Ballindaine, Acts, v. 460.

[9] Law of Name and Change of Name, p. 28; Statutes (at large) Ireland, 1786, i. 29.

[10] Mr Macaleese's Bill, Law of Name and Change of Name, p. 47.

[11] General Register of Sasines, 26th October 1836.

304. It thus falls to the parent to "take unto" the child the surname with which it is to start life. Normally, a father confers his own surname on his children, but he has often, for various reasons, been induced to give them others. There is evidence illustrating how the chiefs of Grant and Gordon induced inhabitants of their territory to assume, or to confer, upon their children the clan surname.[8] Sir George Mackenzie recognises that parents may give their children different surnames, and observes that where a man has married an heiress, and has assumed her name and arms, it is "ordinary to make the eldest son only to bear the name," but comments, "It seems very reasonable that even all the younger children should bear the name if they get any patrimony out of the (entailer's) family." [9] Unless any obligation exists, freedom of selection is unrestricted. A Scots birth certificate recognises this in specifically requiring that the child's surname be recorded in Column 1, and not, as in England, left to inference from Column 4.[10] The Scots system is of some convenience in cases of entail or succession, as it enables a junior son, destined to succeed his mother or other cognate relative, to be so named at birth, and thus obviate the inconvenience of a change of name later in life.

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[1] Sir George Grey, Home Secretary, 1862. See para. 305, *infra*.

[2] 17 & 18 Vict. c. 80, Schedule A.

[3] Law of Name and Change of Name, p. 6.

[4] *Ibid.*, p. 48.

[5] Gordon Peerage, Proceedings, p. 496, per Lord Advocate.

[6] Macgregor, 3rd April 1603, Privy Council, vi. 338.

[7] Ruthven, Acts, iv. 213.

[8] I. F. Grant, Social and Economic Development of Scotland, p. 501; "Bow o' Meal Gordons," W. and A. Smith, New History of Aberdeenshire, ii. 722.

[9] Sir George Mackenzie, Works, ii. 490.

[10] 17 & 18 Vict. c. 80, Schedule A, now somewhat altered under s. 74.

SECTION 11.—CHANGE OF NAME.

SUBSECTION (1).—*Right to Change.*

305. There are two broad lines of argument on this question. First, that anyone is entitled to take any name he chooses, subject, as above noted, to exception in cases of names of dignity, at least in Scotland, and provided that any change is made with "publicity, good faith, and the absence of any improper object." [1] Second, that Royal, statutory, or official permission is requisite for every change. The latter view is set forth in Messrs Fox-Davies and Carlyon-Brittain's work,[2] but the Courts on both sides of the Border have taken the former view.[3] In Scotland, Lord President Hope laid down that "there is no need of the authority of this Court to enable a man in Scotland to change his name," [4] and this has been affirmed in subsequent petitions.[5] In two later cases, Lord Adam observed: "Any person may, without authority of the Court, call himself what he pleases," [6] and "The petitioner has a perfect right to change his name, and no one can prevent him from adding to it or altering it." [7] In England, the same opinion has been expressed by Lord Chancellor Eldon,[8] and Chief Justice Abbott observed: "A name assumed by the voluntary act of a young man . . . by which he is constantly called, becomes for all purposes . . . as much, and as effectively his name as if he had obtained an Act of Parliament to confer it upon him." [9] The question was argued at much length in 1869, when the illegitimate son of a mulatto slave assumed the name of her employer. The Privy Council held that there is no exclusive property in names, and that only trade names are capable of protection.[10] This has been carried even further (and to an extent not permitted in Scotland) in the case of Countess Cowley.[11] In 1862, the rule sustained on both sides of the Border was stated by Sir George Grey, Home Secretary, in the House of Commons: "A man's name is that by which he is generally known. How he may have acquired it does not matter. It is his name, and he has a right to be called by it, if it is the name which he usually receives amongst his friends and acquaintances." [12] In making changes of name it is obviously necessary that some formal step be taken, so that the party's identity under the new name and the old name may be conclusively established, and in order to preclude the possibility of prosecution under the Registration Acts.[13] This may be done in several ways.

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[1] T. Falconer, On Surnames, p. 30.

[2] Law of Name and Change of Name.

[3] Seton, Law and Practice of Heraldry, p. 400.

[4] *Young*, 1835, 13 S. 262.

[5] *Finlayson*, 1844, 2 Broun 17; *Kinloch* v. *Lourie*, 1853, 16 D. 197.

[6] *Johnston*, 1899, 2 F. 76.

[7] *Robertson*, 1899, 2 F. 127.

[8] *Leigh* v. *Leigh*, 1808, 15 Ves. 92.

[9] *Luscombe* v. *Yates*, 1822, 5 B. & A., 344.

[10] *Du Boulay* v. *Du Boulay*, 1869, L.R. 2 P.C. 430.

[11] *Earl Cowley* v. *Countess Cowley*, [1901] A.C. 459.

[12] W. P. W. Phillimore, Index of Changes of Name, vol. xxiv.

[13] 17 & 18 Vict. c. 80, s. 60.

SUBSECTION (2).—*Statute.*

306. Private Acts of Parliament may be obtained for effecting changes of name, but these statutes, the cost of which exceeds £200, have usually been resorted to for relief from the "name and arms" clause of certain entails where they conflicted with peerage titles or otherwise. The Scots statutes, in addition to a number of ratifications and entails, contain one or two specific Acts for changes of name. On 10th May 1527, Robert Bertoun having married the heiress of Mowbray of Barnbougle, a statute is passed ordaining that he "suld be callit Mowbray," [1] and it is observed that the statute seems not so much to have been to enable Bertoun to take the name of Mowbray as to compel him to do so.[2] Another statute, in 1707, substituting Graham for Pyet, is based on the ground that, in trading at home and abroad, a "publick act" was necessary.[3]

SUBSECTION (3).—*Royal Licence.*

307. This form of obtaining recognition under a new name is competent both in England and Scotland, and application is here made by petition to the Secretary of State through the Lyon Office, and to Lyon the warrant (if any be issued) is directed. It is a costly process, usually exceeding £100, and although Scotsmen occasionally apply for such licences, the practice is of English seventeenth-century origin. The Crown does not grant the new name, and even in "Ross-of-Bladensberg" the licence is no more than a "permission to be called," and hyphens do not appear in the exemplification.[4] Lord Chancellor Eldon observed, "The King's licence is nothing more than permission to take the name, and does not give it. A name, therefore, taken in that way is a voluntary assumption." [5]

SUBSECTION (4).—*Lord Lyon's Certificate.*

308. The Scottish substitute for the expensive Royal Licence is a certificate of "Official recognition of change of name" granted by the Lord Lyon King of Arms in virtue of his ministerial powers, wherein he exercises (within his jurisdiction) the Sovereign's prerogative.[6] "The Lord Lyon will not, as is popularly believed, grant authority to an individual to change his name, but on the narrative that he has already changed it, he will grant him arms under his new name, and . . . will certify the fact of the change." [7] This certificate is recognised by War Office and Admiralty as identifying the bearer of the new name, which is the only object of the King's Letters Patent.[8] Lyon's certificate goes further: it "officially recognises" the new name. When arms are granted or matriculated, the certificate is embodied in the patent or extract, but where no grant, matriculation, or change of arms is desired, a "Certificate of Change of Name" is granted for 15s. (and expense of proof, if any), the fee being modified under the Lyon Office Act of 1867.[1] Where more than one certificate is required, the petitioner or his agents may supply properly authenticated copies, but additional duplicate certificates may be obtained from the Lyon Clerk at 15s. each.[2]

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[1] 1581, c. 46, Acts, iii. 232.

[2] Stevenson, Heraldry in Scotland, p. 367.

[3] Acts, xi. 437.

[4] A. C. Fox-Davies, Armorial Families, p. 284.

[5] *Leigh* v. *Leigh*, 1808, 15 Ves. 92.

[6] *Macdonald* v. *Macdonald*, 1826, 4 D. 371.

[7] J. H. Lorimer, Handbook of the Law of Scotland, 2nd ed., p. 445.

[8] Seton, Law and Practice, p. 407.

Subsection (5).—*By Authority of the Court of Session.*

309. Under its *nobile officium* the Court of Session may allow a person to change his name, or at least recognise his having done so. Most of the petitioners have been advocates, writers to the Signet, or notaries public, who, in consequence of provisions of entails or other settlements, were obliged either to change their names or adopt additional surnames.[3] A change of designation or territorial "title" has been incidentally recognised,[4] but, as in the case of the grant of or succession to a name of dignity, this is considered unnecessary where the original surname remains the same, probably in consequence of the permissive terms of the Act 1672, c. 47.[5] The Court refuses petitions regarding change of name unless absolutely necessary, and has referred the petitioner to the Lord Lyon,[6] but a petition was granted in 1899, for special reasons, and the Court's attention not having been drawn to Lyon's jurisdiction.[7]

Subsection (6).—*Public Advertisement.*

310. Frequently a public advertisement in the press, in England usually of a deed poll, is regarded as sufficient intimation of a party's change of name, but for preservation and security it is usual in Scotland for such changes to be recorded either in the Books of Council and Session or of the Lyon Court or of the Sheriff Court. In England, a deed poll is usually recorded in the College of Arms, but these registers, unlike those of the Lyon Court, are not public.

Subsection (7).—*Marriage.*

311. In Scotland a woman normally assumed her husband's feudal title, whether peerage or territorial, and in the latter case was known as, *e.g.* "Lady Polmaise"[8] (if holding of the Crown) or, *e.g.* "Guidwife of Auchlunkart"[9] (if holding of a subject superior).[10] If she married a knight or baronet she prefixed "Dame" to her own name, *e.g.* "Dame Rachel Nicholson, Lady Preston";[1] if a peer's daughter she also retained the prefix "Dame" or "Lady," and added her husband's territorial designation, *e.g.* "Dame Barbara Sinclair, Lady Innes";[2] Dame Margaret Hay, Lady Bass.[3] If the wife herself had a territorial designation or name she sometimes retained it, even along with her husband's peerage, *e.g.* "Lucy Elizabeth Douglas of Douglas, Countess of Home."[4]

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[1] 30 and 31 Vict. c. 17, Schedule B.

[2] *Mackenzie-Inglis of Glencorse*, April 1930, Lyon Register, xxix. 10.

[3] For various examples, see Seton, Law and Practice, p. 409.

[4] Graham of Duntroon, 1823, Seton, p. 410.

[5] See para. 300, *supra.*

[6] *Forlong*, 1880, 7 R. 910; *Robertson*, 1899, 2 F. 127.

[7] *Johnstone*, 1899, 2 F. 76.

[8] *Lady Polmaise* v. *Tenants*, 1580, Mor. 3026.

[9] Spalding Club, Trubles in Scotland, ii. 355.

[10] Mackenzie, Works, ii. 583, s. 4.

312. Until recently a Scots married woman never dropped her maiden surname, or took her husband's name at all, and married women signed with their maiden names.[5] The modern practice arose from the upper classes adopting English custom, but even so, a married woman is formally described as "Mrs Elizabeth Mackintosh or Gordon of Glenbracken," thus preserving in every legal deed her maiden identity. The husband's designation, if any, is assumed along with the rest of his "name."[6] The Registration Act of 1854,[7] whose forms have been based on the law of England (where the identity and name of a woman is, on marriage, entirely sunk in her husband's), has given some currency to English practice, but in Scotland any change on marriage is purely voluntary. There is nothing in Scots law to prevent a woman retaining her maiden surname, and no reason why the husband should not by the same process adopt his wife's name on marriage, which he is sometimes required to do, under entails.[8] In subsequent birth certificates, the Registrar would in that case insert the husband as "formerly . . . ," and repeat the wife's own name in the space for wife's "maiden surname," thus meeting a situation quite consistent with Scots law, and which has lately been the subject of discussion in women's organisations—where the English law alone has received notice.

313. Persons who give false names in marriage proclamations, or get married under false names, are liable to prosecution[9] and imprisonment, but the ceremony is valid in accordance with the maxim, *Nil facit error nominis, cum de corpore vel persona constat,*[10] and the Registers are corrected by warrant of the Sheriff.[11] In England, much hardship has been caused, because such a marriage is voidable,[12] but it has been held that the true name is the name by which the party is known, and not necessarily his original name.[13] If one of the parties has changed his name, it is proper and advisable to state this in the Marriage Schedule, but grant of a name of dignity, or succession thereto, or of a territorial "title," where the original or basic surname remains unchanged, is not regarded as a change but as an amplification of the original name.

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[1] *Nicolson* v. *Oswald*, 1712, Mor. 2987.

[2] Commissariat of Edinburgh, Tests, 6th February 1576.

[3] *Ibid.*, 20th February 1583.

[4] Seton, Law and Practice, p. 393.

[5] *Ibid.*, p. 392.

[6] *E.g.* Official Account of the Royal Visit, 1822, p. 170.

[7] 17 & 18 Vict. c. 80.

[8] *Eliot of Stobs*, 1803, Mor. 15542; for others, see Seton, Law and Practice, pp. 361–6; Mackenzie, Science of Heraldry, chap. xxiv.

[9] 17 & 18 Vict. c. 80, ss. 60, 62; *Ewing*, Sheriff Court of Rothesay, 28th January 1930.

[10] Seton, Law and Practice, p. 419; T. Falconer, On Surnames; Report of the Royal Commission on the Laws of Marriage, 1868, per Lord Pres. Inglis.

[11] 17 & 18 Vict. c. 80, s. 63.

[12] Seton, Law and Practice, p. 418.

[13] *Rex* v. *Billinghurst*, 1814, 3 M. and S. 250; *R.* v. *Tibshelf*, 1830, 1 B. & Ad. 190; Seton, Law and Practice, p. 419.

SECTION 12.—REGISTRATION.

314. Various attempts at vital registration were made, with the parish as a unit, and vital registration was regarded as an ecclesiastical matter, but none of these proved effective until the Act of 1854 for registration of Births, Deaths, and Marriages.[1] Various forms with indicative examples are annexed to the statute, some of which have been modified under s. 74, and cover most circumstances. The duty of the public is to give the true particulars, and if those supplied are thought to be false, proceedings may be taken against those supplying same, and these are punishable on conviction by the Court.[2] The duty of the Registrar is to record accurately the particulars supplied,[3] but if there is reason to doubt the legality or veracity of the particulars, the party is warned that penal proceedings may be instituted, and it is the Court that decides the truth or falsity of the particulars.[4] In certain cases, however, viz., names of dignity, the Registrar is not at liberty to insert in his official documents such name of dignity unless the informant satisfies him that the person to whom it is attributed has qualified a right thereto in the prescribed manner,[5] but on the party's statement that such title has been genuinely qualified, the Registrar normally does record it as a matter of course, and the party would be liable to prosecution and penalties if this had been done on false information.

315. When a change of name has been made, or has occurred,[6] in consequence of, or in connection with, a change of status,[7] the alteration being a (indirect) result of the decree and so a competent part of the "rectification" of the entries "affected," such change is (in these cases) noted in the "Register of Corrected Entries." Where a false name has been obtained to be registered,[8] and the entry is corrected by warrant of the Sheriff, such alteration of name is also made in this register. Change of name on adoption is not an alteration made in connection with "change of status," and falls under the ordinary rules of change of name. No alteration on the original registration can be made, and where the identity of the individual requires to be proved one of the various extracts or a certificate of change of name (stating the circumstances) should be produced along with the original extract birth certificate.

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[1] 17 & 18 Vict. c. 80.

[2] *Ibid.*, s. 60.

[3] *Ibid.*, s. 61.

[4] *Ibid.*, ss. 62, 63.

[5] "Baronet," Order in Council, 5th March 1910; see also Kerr of Littledean ("Lord Jedburgh"), 2nd December 1613, Privy Council, x. 181); *Drummond* v. *Farquhar* ("Bishop"), 6th July 1809, F.C.; *Synod of Aberdeen* v. *Milne's Trs.* ("Lord Provost"), 1847, 9 D. 748; *Goodeve-Erskine* v. *Earl of Kellie* ("Earl"), 1873, 11 M. 876; Mackenzie (Gretna Parish Registrar), "Sir," 28th October 1929.

[6] It is thought a divorced peeress could not in Scotland retain her *nomen dignitatis* as a "name," as Countess Cowley did in England. See *Earl Cowley* v. *Countess Cowley*, [1901] A.C. 459.

[7] 18 & 19 Vict. c. 80, s. 63.

[8] *E.g.* Ewing, Rothesay (Marriages), 1929, No. 26; Sheriff Court, 28th January 1930.

SECTION 13.—BASTARDS.

316. In England, Lord Stowell remarked that, "These have no proper surname but what they acquire by repute, though it is a well-known practice . . . to give them the surname of the mother, whose child they certainly are, whoever be their father," [1] but there is nothing to compel a bastard to bear his mother's name.[2] The law of Scotland, possibly owing to the frequency of handfast marriages and other irregular unions, has been much more considerate to bastards, who may, indeed, on proof of pedigree, matriculate name and arms with the prescribed bastard's difference, in Lyon Court, by exactly the same procedure as a lawful cadet. Until recently, the normal practice in Scotland was for bastards to bear their father's name. Lately under the influence of English custom, and the father's desire to conceal his immorality, it has become the practice to require the mother to give the child her own name. She is entitled to give the child any surname she pleases,[3] but in no circumstances may the name of a putative father be entered in the Register, unless he appears along with the mother to sign the Register,[4] and, where his surname is conferred, he is required to attend along with the mother.[5]

SECTION 14.—DESIGNATIONS.

317. Scots law requires that, in any writ, the identity of the person addressed or summoned [6] shall be definitely indicated, and this has been insisted upon since the reign of Robert I, who himself declared that "Robert Bruce, governing in Scotland," was not a sufficient designation without his title.[7] Our law differs fundamentally from that of England, where those under the rank of knight are cited by baptismal name and surname only,[8] and "John Smith" means the particular John Smith intended to be cited. The general rule for Scotland has been laid down as follows: "If a man have property or title, these are his proper designation." Failing this, profession or trade. "In default of these, he cannot be designated other than by his residence." [9]

318. The residence may always be added where known, but in the first instance, the name and title or property should be inserted. The name itself, if it include a territorial designation, may suffice,[10] but even

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[1] Seton, Law and Practice, p. 419; Hubback, Evidence of Succession, p. 280, note 10.

[2] Fox-Davies and Carlyon-Brittain, Law of Name and Change of Name, pp. 107–109.

[3] *Du Boulay* v. *Du Boulay*, 1869, L.R. 2 P.C. 430.

[4] 17 & 18 Vict. c. 80, s. 35.

[5] Registration of Births, Schedule B, Instructions.

[6] *Sceales* v. *Sceales*, 1866, 4 M. 300.

[7] Rymour, Fœdera, iii. 317, 340; Tytler's History of Scotland, i. 341–344.

[8] Hawkins's Pleas of the Crown, bk. ii. chap. xxiii. s. 103.

[9] *Joel* v. *Gill*, 1859, 22 D. 12.

[10] *Montgomery* v. *Laird of Fergushill*, 1632, Mor. 3749; *Crs. of Creighton of Castlemains* v. *H.M. Cashkeeper*, 1684, Mor. 3750.

"Angus Mackintosh of Mackintosh, Captain and Chief[1] of Clan Chattan," was held insufficient in an action concerning landed property, since there was no averment of ownership,[2] there being no place "Mackintosh."[3] As already observed, the right to names of dignity must have been properly established, or instantly capable of proof, before they can be assumed or used as designations.[4]

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[1] The use of both these terms is accounted for by the fact that the Captaincy and Chiefship of Clan Chattan have long been disputed between Mackintosh and Cluny Macpherson. G. Burnett, MSS. Account of Lyon Office, p. 22.

[2] Compare Sir Evan John Murray MacGregor of MacGregor and Balquidder, Baronet. See *Macgregor* v. *Brown*, 1838, 3 S. & M'L. 84.

[3] *Mackintosh* v. *Mackintosh*, 1835, 13 S. 884.

[4] Kerr of Littledean, 2nd December 1613, Privy Council, x. 181; *Drummond* v. *Farquhar*, 6th July 1809, F.C.; *Aberdeen Synod* v. *Milne's Trs.*, 1847, 9 D. 745; *Alexander* v. *King's Advocate*, 1830, 8 S. 634; *Earl of Stirling* v. *Officers of State*, 1831, 9 S. 413; *Goodeve-Erskine* v. *Earl of Kellie*, 1873, 11 M. 876.

NATIONAL FINANCE.

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SECTION 1.—INTRODUCTORY.

319. The purpose of this article is to outline the law and practice of the present financial system of the United Kingdom. This system is the outcome of a very gradual development, closely linked with the growth of Parliament itself, and can only be fully appreciated by reference to history. It is accordingly necessary to preface an account of the purely modern law and practice by an historical introduction. The historical origins of the present financial system belong almost entirely to English history. Of the pre-Union Scottish financial system, the two most important survivals have been the hereditary revenues of the Scottish Crown (see CROWN: The Royal Revenue)[1] and the land tax or Cess (see LAND TAX).[2] As these topics are separately dealt with elsewhere, further reference to them here may be omitted.[3] The present article deals first with those principles and characteristics of our financial system which must be treated historically, and next with the present financial system.

SECTION 2.—HISTORICAL.[4]

SUBSECTION (1).—*Taxation only by Statutory Authority.*

320. No taxation may be imposed except by statutory authority. The history of taxation is largely an account of the efforts, finally successful, made by Parliament to secure the recognition of this principle. Taxation is historically a comparatively late device for raising revenue. Instances before the Norman Conquest are rare. In the earliest period the king was independent of the necessity of resorting to taxes for his revenue, because the sphere of government was limited and its expense was defrayed by certain non-tax revenue arising from various sources over which he had unfettered control, *e.g.* Crown lands, feudal dues, profits of justice, distribution of jurisdictional and other rights, revenues from vacant sees and benefices, and certain customary merchant duties.[1] It is not until just before the Norman Conquest that there occurs the first imposition of an extraordinary tax—Danegeld—levied to buy off the attacks of the Danes. After the Norman Conquest, however, the rapid expansion of central government was attended by a corresponding growth in public expenditure, to meet which new forms of extraordinary taxation had to be devised. The administrative reforms of Henry II. included important innovations with regard to both tax and non-tax revenue. The earliest form of taxation—Danegeld—had been a land tax, viz. 2s. on every hide of land,[2] and taxation of land remained the principal form in use till the reign of Henry II.[3] In 1166 there was imposed the first tax on moveables,[4] and this method of taxation was repeated, in 1188, in the imposition of the Saladin Tithe. While the earliest taxes were apparently mere arbitrary exactions,[5] with the rapid extension of these burdens there arose the conception of a tax as the contribution of the individual payer, not to be exacted from him without his consent. From the dawn of this idea is to be traced the growth of efforts at parliamentary control of taxation.

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[1] Vol. V. p. 313, *ante*.

[2] Vol. IX. p. 1, *ante*.

[3] Further authorities are: Rankine, Land-Ownership, 4th ed., pp. 219, 834 *et seq.*; Bell's Prin., 10th ed., s. 1123 *et seq.*; Dicey and Rait, Thoughts on the Scottish Union, pp. 14–18, 285–287; Anson, Law and Custom of the Constitution, vol. ii. pt. ii. p. 135.

[4] GENERAL AUTHORITIES: Maitland, Constitutional History of England, 1919; Taswell-Langmead, English Constitutional History, 9th ed.; Medley, English Constitutional History; Hallam, Constitutional History of England; Erskine May, Constitutional History of England from 1760, 1912; Keir and Lawson, Cases in Constitutional Law, 1928.

321. Chapters 12 and 14 of Magna Carta, which respectively forbid the imposition, except by consent, of all but three specified aids, and prescribe the machinery by which consent is to be expressed, have often been cited as marking the first important recognition in England of the principle of self-taxation. But these chapters are far from formulating any such doctrine.[6] They deal not with taxation in general but with specific feudal exactions, and are primarily intended to protect Crown vassals from impositions levied by John, not *qua* sovereign but *qua* feudal superior. There was as yet no recognition of the principles that taxation should be imposed only of consent, or that the consent to a tax might be expressed through the majority resolutions of a national representative assembly. The earliest recognition of these principles is not until 1297, when, by the *Confirmatio Cartarum* and the (so-called) statute *De Tallagio non Concedendo*, Edward I. conceded that no aid should be imposed without the common consent of all the realm. Thereafter it may be said that "the imposition of any direct tax without the common consent of the realm was against the very letter of the law. . . . And the common consent of the realm was now no vague phrase; that consent had now its appropriate organ in a parliament of the three estates." [1]

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[1] The last of these sources of revenue was never clearly defined, and later when it became necessary for the king, in principle, to concede to Parliament the control of taxation, these customary duties were generally regarded as an exception to the principle. This constituted one of the difficulties in *Bate's* case, 1606, 2 St. Tr. 371; see para. 323, *infra.*

[2] The measure of taxation was area, not value. Cess, or land tax, in Scotland was always a tax based on land values.

[3] Danegeld was revived in a more stringent form during the reign of Richard I., under the name of "carucage."

[4] Davis, England under the Normans and Angevins, p. 271.

[5] They appear to have been acquiesced in, on the footing that the king was not expected to have recourse to them except on the occurrence of great national emergencies.

[6] *Cf.* M'Kechnie, Magna Carta, pp. 274 *et seq.*, 291 *et seq.*

322. Subsequent events shewed that the question of indirect taxation, however, had not been finally settled. In the reign of Edward III., Parliament took advantage of the Sovereign's financial embarrassments at the outset of the Hundred Years War, and asserted that its consent was required for all forms of taxation, not merely direct, but also indirect. Instances of arbitrary taxation are very rare under the Lancastrian kings. But the renewed strength of the monarchy under the Yorkists and Tudors enabled it to disregard the earlier precedents for the parliamentary control of taxation, and to devise new forms of arbitrary imposition—notably "forced loans" and "benevolences." [2] The strength and popularity of the Tudor monarchs and the, at any rate initial, subservience of Parliament postponed the re-establishment of parliamentary control of taxation for a century.

323. The serious struggle against arbitrary taxation was only renewed at the close of Elizabeth's reign. In the succeeding reign it reached its first crisis in *Bate's* case.[3] The question raised in that case was the legality of an additional duty levied by James I. on imported currants. The point decided in favour of the king was that, as the control of imports belongs to the sphere of foreign policy the direction of which is the prerogative of the king, the king may by virtue of his prerogative lay a duty on imports. It had always been a question of difficulty as to whether the king might not, at his own hand, levy impositions or customs duties, as distinct from other forms of taxation. But the dicta in *Bate's* case went further than the decision, and challenged the general principle of the illegality of taxation imposed without the authority of Parliament. The decision was hotly debated in Parliament; but a remedial Bill, proposing that no imposition, other than those already in existence, should thereafter be levied without consent of Parliament, was thrown out by the Lords; and *Bate's* case [3] continued, until the Civil War, to afford judicial sanction for the levying of impositions by virtue of the prerogative.

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[1] Maitland, Constitutional History of England, 1919, p. 96.

[2] Benevolences were "gifts" exacted by the king. Forced loans were contributions exacted by him on a promise of repayment. The form of the letters under the privy seal containing his promise of repayment, ran: "We, Henry VIII., . . . promise by these presents truly to content and repay unto our trusty and well-beloved subject, *A. B.*, the sum of , which he hath lovingly advanced unto us, by way of loan, for defence of our realm, and maintenance of our wars against France and Scotland: In witness whereof we have caused our privy seal hereunto to be set and annexed this day of , the fourteenth year of our reign." *Cf.* Hallam, Constitutional History of England, i. 19.

[3] 1606, 2 St. Tr. 371.

324. In the remainder of James I.'s reign, and at the commencement of Charles I.'s reign, various other expedients were resorted to by the king for raising revenue. At length Charles's exaction of a general forced loan led, with other but non-financial grievances, to the enactment of the Petition of Right,[1] which, by its first article, narrated the statutes of Edward I. and Edward III. against arbitrary taxation, and reiterated the principle that subjects "should not be compelled to contribute to any tax, tallage, aid, or other like charge, not set by common consent in Parliament." The Petition of Right is to be regarded rather as declaring the existing law than as enacting new law, and the purpose of its first article was not so much the conclusive declaration of a general taxing principle as the redress of the immediate grievances relating to direct taxation. Hence it was apparently not regarded as overriding the decision in *Bate's* case,[2] and it played a comparatively unimportant part in the argument and decision in the succeeding case of *Ship-money.*[3] The *Ship-money* case [3] decided that the king might levy a direct tax on his subjects for the safety and defence of the realm when necessary, and that the king was sole judge of the necessity. Though it might be contended that custom duties were within the scope of the prerogative, it could not be gainsaid that ship-money was a direct tax, and therefore the majority of the judges were driven, in deciding the case in favour of the king, to the extreme assertion that the right to tax was part of the prerogative. Parliamentary control of taxation was completely reasserted at the outbreak of the Civil War, principally by two Acts, the first of which [4] annulled the effect of the decision in *Bate's* case [2] by declaring "that no subsidy, custom, impost, or other charge whatsoever, ought or may be laid or imposed upon any merchandise exported or imported . . . without common consent in Parliament"; while the second [5] declared void the proceedings and decision in the *Ship-money* case,[3] and reaffirmed the statutes passed in restraint of arbitrary taxation. After the Restoration, the renewed attempts of James II. to levy, without parliamentary authority, the customs duties granted by Parliament during life to Charles II., led to a final and general reassertion of Parliament's right to exclusive control of taxation, in the Bill of Rights,[6] by which it was declared "that levying of money for the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time, or in other manner, than the same is or shall be granted, is illegal."

325. Since the Bill of Rights, the exclusive right of Parliament to authorise taxation has not been questioned. The rule of law has, however, been recently applied in the leading case of *Bowles* v. *Bank of England.*[7] In that case it was held that a resolution of the House of

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[1] 1628, 3 Car. I. c. 1.

[2] 1606, 2 St. Tr. 371.

[3] 1637, 3 St. Tr. 825.

[4] 16 Car. I. c. 8.

[5] *Ibid.*, c. 14.

[6] 1689, 1 Will. & Mary, Sess. 2, c. 2.

[7] [1913] 1 Ch. 57.

Commons sitting in Committee of Ways and Means, assenting to income tax at a certain rate for the ensuing financial year, did not, either *per se*, or after adoption by the House of Commons, authorise the Crown to levy on the subject the tax so assented to before the tax had been actually imposed by Act of Parliament. The plaintiff succeeded in recovering income tax which had been so exacted from him. Parker J. (as he then was) said: [1] "Does a resolution of the Committee of the House of Commons for Ways and Means, either alone or when adopted by the House, authorise the Crown to levy on the subject an income tax assented to by such resolution but not yet imposed by Act of Parliament? . . . This question can, in my opinion, only be answered in the negative. By the statute 1 Will. & Mary, usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever." When, however, the Parliament Act, 1911,[2] had conferred on the House of Commons exclusive control of money bills, there remained no reason why a resolution of that House should not be made the authority for, at least, the provisional imposition of a tax. Accordingly, the case of *Bowles* [3] was followed by the enactment of the Provisional Collection of Taxes Act, 1913,[4] by which a resolution of the House of Commons was made the authority for the imposition of certain taxes,[5] subject to the proviso that the taxes imposed should be invalid unless authorised by Act of Parliament within four months of the resolution. This Act is thus, in itself, a recognition of the principle laid down in the Bill of Rights.

326. The principle was again applied in *Attorney-General* v. *Wilts United Dairies.*[6] The facts in that case were that the Food Controller, set up in 1916,[7] having been empowered by statute to make orders regulating, *inter alia*, the sale or purchase of articles of food, issued orders providing that, excepting under licence, no milk might be either purchased within an area comprising the south-western counties of England or brought outside that area for distribution. He granted a licence to the defendants, but made it subject to the condition that they should pay him twopence for every gallon of milk purchased. The defendants afterwards refused to pay this levy. It was held that the Food Controller was not entitled to recover. Atkin L.J. said: [8] "No power to make a charge upon the subject for the use of the Crown could arise except by virtue of the prerogative or by statute, and the alleged right under the prerogative was disposed of finally by the Bill of Rights (1 Will. & Mary, Sess. 2, c. 2). . . . If an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue) he must shew, in clear terms, that Parliament has authorised the particular charge."

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[1] At p. 84.

[2] 1 & 2 Geo. V. c. 13; see para. 332, *infra.*

[3] [1913] 1 Ch. 57.

[4] 3 Geo. V. c. 3; see para. 349, *infra.*

[5] Customs, Excise, and Income Tax.

[6] 1922, 38 T.L.R. 781; 1921, 37 T.L.R. 884.

[7] 6 & 7 Geo. V. c. 68, s. 3.

[8] 37 T.L.R. 884, at p. 886.

SUBSECTION (2).—*Appropriation of Supplies.*

327. The claim of Parliament to appropriate all supplies voted to the service of the Crown is, historically, the sequel to its claim to control taxation. The assertion of a claim to appropriate supplies dates from the reign of Edward III., the very reign in which Parliament may also be said to have for the first time asserted a general claim to control all taxation. Edward III.'s constant need for subsidies for the Scottish and French wars enabled Parliament to insist that the supplies granted for those wars should be appropriated exclusively to their conduct. Thus, in 1348 and 1353, the supply granted was appropriated respectively to defence against the Scots and to the French war. In the succeeding reign of Richard II., the appropriation of supplies became more elaborate. In 1390 it was directed that, from a 40s. subsidy on wool, 10s. were to be appropriated to the king's present needs, while the remainder was to be expended only in the event of the continuance of war. During the same reigns, also, the first demands were made for the production of accounts. Before fresh supply was granted, the expenditure of the last supply had to be accounted for. The control of expenditure was already recognised by the reign of Henry IV. With the revival of a strong monarchy, however, under the Yorkists and Tudors, Parliament relaxed its hold upon expenditure, and the appropriation of supplies was not again acutely agitated until the reign of Charles II.[1] In 1665, a supply of £1,250,000 having been voted for the Dutch war, there was introduced into the bill authorising the subsidy a proviso that the money raised by that Act should be applicable only for the purposes of the war, and the bill became law in this form.[2] "That supplies, granted by Parliament, are only to be expended for particular objects specified by itself, became, from this time, an undisputed principle, recognised by frequent and at length constant practice."[3] After the Revolution it became the invariable practice for Parliament to appropriate all supplies except the hereditary revenues of the Crown. With the accession of George III., these sources of revenue, till then beyond Parliament's control, were gradually surrendered by the King, in exchange for a fixed annual grant voted to him by Parliament, viz. the Civil List.[4] Thereupon Parliament, or rather the House of Commons, acquired control over the appropriation of all supplies. Such an achievement has had the utmost constitutional significance. "This has given the House of Commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence."[1]

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[1] An instance of appropriation took place in 1624, when money was specifically voted for the relief of the Palatinate; and again in 1641. Hallam, Constitutional History of England, ii. 356.

[2] 17 Car. 2, c. 1.

[3] Hallam, ii. 357.

[4] See CROWN: The Royal Revenue, Vol. V. p. 313, *ante*.

328. The appropriation of supplies is now effected by the passage each year of an Appropriation Act,[2] which gathers up all the supplies granted to the Crown during the year, and appropriates them, in detail, to specific objects. In the recent case of *Mulvenna* v. *The Admiralty*,[3] the effect of the appropriation of supplies by Parliament was before the Court. The question in the case was as to the arrestability of an Admiralty workman's wages. The Admiralty pled that the wages were non-arrestable, on, *inter alia*, the ground that the workman's pay was "provided out of moneys appropriated by the Crown[4] for a particular purpose"; and it was argued that the naval estimates out of which the common debtor's wages were paid were earmarked annually by the Appropriation Act.[5] The Court sustained the plea.

SUBSECTION (3).—*Commons' Control over Money Bills.*

329. The insistence, on the part of the House of Commons, of a right, first, to initiate, and, later, to control, money bills, dates from the reign of Henry IV., when, in 1407, the Lords having at the king's request specified certain subsidies as requisite for national defence, the Commons protested against this as in derogation from their privileges.[6] The king met the situation by solemnly granting and declaring, with the advice and assent of the Lords, that no subsidy "granted by the Commons and assented to by the Lords" should be reported to the king until the Houses were in agreement on the matter, and that the grant thus agreed to should be reported to the king by the Speaker of the Commons. This incident fixed the rule that the initiative lay with the Commons.[6] During the next two centuries the form in which the grant ran occasionally varied, but the language usually adopted was that the Commons "granted" with the Lords' "assent." In the first Parliament of Charles I., however, the Commons began to omit the name of the Lords in the preamble of bills of supply, reciting the grant as if wholly their own, but in the enacting words adopting the customary form of statutes. This, though at first remonstrated against by the Lords, has continued ever since to be the practice. The form now in use is as follows: "Most gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in

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[1] Hallam, iii. 117..

[2] As to which, see para. 353, *infra*.

[3] 1926 S.C. 842; 1926, S.L.T. 568.

[4] *Sic.*

[5] 1926, S.L.T. 568, at p. 570.

[6] The record is that the Commons "en furent grandement destourbez, en disant et affermant ce estre en grant prejudice et derogation de lour libertees," Rot. Parl. 1407, iii. 611. *Cf.* Dykes, Source Book of Constitutional History from 1660, pp. 22, 23.

Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this session of Parliament have resolved to grant unto Your Majesty the sums hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—" [Then follow sections of the Act.[1]]

330. The rule that the initiation of money bills lay with the Commons did not prejudice the right of the Lords to reject or modify such bills originating in the Commons. The next stage in constitutional development was reached in Charles II.'s reign, when the Commons went on to claim, not merely that money bills should originate only in their House, but also that the Lords should make no amendment upon them. In 1661 and 1671 the Lords amended money bills sent up from the Commons, in the former instance by inserting a clause imposing a tax, in the latter instance by reducing a tax proposed by the Commons.[2] In both instances the Commons protested. A final and more drastic protest was made in 1678, when the Commons passed this sweeping resolution: "That all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords." [3] The Commons, however, still admitted the Lords' right to reject money bills without alteration. After several joint-conferences between the two Houses, the Lords were reluctantly forced to acquiesce in the Commons' claim. This resolution, be it noted, affected all bills creating a charge upon the people, including not merely bills dealing with public charges, but also bills imposing local and other rates.[4]

331. From this victory, the Commons went on to snatch another advantage. In 1701 they invented the device of "tacking," whereby any non-financial provision proposed by the Commons, which was unlikely to pass the Lords without amendment, was "tacked" by the Commons on to a money bill, so that the Lords were coerced into the dilemma of either accepting the obnoxious provision as it stood or rejecting the bill as a whole. Though, in theory, the Lords retained the right to reject a money bill without alteration, they used this right sparingly. In 1763, when they opposed the third reading of a bill for wines and cider duties, it was observed that this was the first occasion on which they had been known to divide upon a money bill.[1] In 1860 the Lords came into sharp collision with the Commons, through rejecting a bill for the repeal of the paper duty. After protesting against the rejection of the bill, the Commons, in the following session, forestalled a second rejection by including the repeal of the paper duty in a general finance bill, which the Lords were compelled to accept.[2] This device led to the virtual negation of the remaining right of the Lords, viz. to reject money bills. Thereafter no further attempt was made by the Lords to reject a money bill until the constitutional crisis of 1909, when the Lords resolved that they were not justified in giving their consent to the Finance Bill of that year until it had been submitted to the judgment of the country.[3] As a result of this crisis, the Lords were forced to participate in the passage of the Parliament Act, 1911,[4] by which the control of the House of Commons over money bills, which had for long existed in constitutional practice, was confirmed and extended in statutory form.

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[1] *Cf.* The Consolidated Fund (No. 2) Act, 1929, 19 Geo. V. c. 10. The form may be studied in any Consolidated Fund Act, Appropriation Act, or Civil List Act (the last Civil List Act being 10 Edw. VII. & 1 Geo. V. c. 28).

[2] Hallam, iii. 30.

[3] Erskine May, Parliamentary Practice, 13th ed., p. 564.

[4] *Ibid.*; as to further attempts to extend the Commons' privileges, see Hallam, iii. 32.

332. The provisions of the Parliament Act, 1911,[4] with regard to money bills, are contained in ss. 1 and 3 of the Act. Sec. 1 (1) deprives the Lords of any right to reject a money bill, by enacting that, if a money bill, passed by the Commons and sent up to the Lords at least one month before the end of session, is not passed by the Lords without amendment within one month of being sent up, the bill may become law without the Lords' consent. A money bill, as defined by the Act, is a public bill [5] which, in the opinion of the Speaker, contains only provisions dealing with the following subjects: taxation; charges on the Consolidated Fund, or on money provided by Parliament; appropriation, etc., of public money; loans; and incidental matters.[6] This definition is designed to prevent "tacking"; it is also expressly made inapplicable to bills whose provisions deal with taxation, money, or loans raised by local authorities.[6] The quasi-judicial function of deciding whether or not any particular measure is a "money bill" is entrusted to the Speaker, who must endorse on every money bill a certificate that it is a money bill.[7] His certificate is conclusive for all purposes and is not to be questioned in any Court of law.[8]

SUBSECTION (4).—*The National Debt.*

333. In a previous paragraph,[9] it has been shewn that, when public expenditure began to exceed the hereditary revenues of the Crown, the first resort for augmenting revenue was to taxation. The second, adopted shortly after, was to borrowing. From the Middle Ages, and notably in the times of the later Angevins, it became the practice of the English kings to borrow freely from their subjects. As security for these loans, they sometimes pledged Crown lands and property or, in other instances, farmed out prospective taxes to be collected by their creditors. In the seventeenth century, loans came to be secured on some branch of the Crown revenue. These loans were, in most cases, punctually repaid; but in 1672 Charles II., under financial pressure occasioned by the Dutch war, suspended repayment of the principal sums of the then outstanding loans and produced a financial crisis. Thereafter lenders demanded some better security than the king's word.

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[1] Taswell-Langmead, English Constitutional History, 9th ed., p. 529, note.

[2] Erskine May, Constitutional History, 1912, i. 381 *et seq.*

[3] For the history of the crisis, see Erskine May, Constitutional History, 1912, iii. 343.

[4] 1 & 2 Geo. V. c. 13. For further treatment of the Parliament Act, 1911, see CONSTITUTIONAL LAW, Vol. IV. p. 416, *ante*, and PARLIAMENT, *infra*.

[5] As to definition of public bill, see ss. 1 (1) and 5.

[6] Sec. 1 (2).

[7] Sec. 1 (3).

[8] Sec. 3.

[9] Para. 320, *supra*.

334. The origin of the National Debt is usually traced to 1692. In that year a loan of £1,000,000 became necessary for the conduct of the French war. The interest on the loan—at first 10 per cent. and, after 1700, 7 per cent.—was secured by Act of Parliament on new liquor duties. The distinguishing features of this loan were that the loan was floated by Act of Parliament, not by the king; that a particular source of revenue was earmarked as security; and that the lenders received life-annuities with the benefit of survivorship, instead of interest with the prospect of the ultimate return of their principal. In 1694, another loan was financed by a body of merchants, who, in return, received the privilege of incorporation by royal charter as "the Governor and Company of the Bank of England." The charter was originally granted for only eleven years, Parliament reserving the right to redeem the debt at any time after 1705; and, with the redemption of the debt, the charter was to expire. The continuance of war, however, not merely rendered immediate redemption impossible, but necessitated the flotation of fresh loans. These loans are the nucleus of the National Debt. Since then, notwithstanding repeated attempts to reduce the debt by sinking funds, the policy of complete redemption seems to have become impracticable.[1] The first method of securing the various loans had been by assigning specific revenues to provide the annual charges of each loan. At this stage it is more correct to speak of national debts than of a National Debt. The first simplification measure was taken in 1752,[2] when the debts charged on certain revenues were consolidated. The taxes supporting these charges were pooled in a common fund, out of which the several charges were paid. In 1787 [3] there was set up the Consolidated Fund, into which were paid the whole proceeds of taxation, and from which were paid, *inter alia*, the yearly charges of the National Debt.

SUBSECTION (5)—*The Consolidated Fund.*

335. Until the close of the eighteenth century it was the practice to assign specific taxes to specific charges, with the result that the public accounts were extremely numerous and confused. Sir William Anson points out that, in the case of the customs alone, there were no less than seventy-four separate accounts each setting forth the receipt of revenue from a particular source and its expenditure on the service to which it was appropriated.[1] To remedy this confusion of accounting there was passed, in 1787, an Act [2] creating the Consolidated Fund, into which was "to flow every stream of the public revenue and from whence [was] to issue the supply for every public service." The Consolidated Fund thereby became the pivot of our financial system. Now, instead of specific forms of revenue continuing to be assigned to specific charges, all revenue flows into the Consolidated Fund, and out of this common fund the various national charges are met. The Consolidated Fund was apparently expected at first to accumulate, and it is regularly styled, even in the latest statutes, "the Consolidated Fund or the growing produce thereof." But it is incorrect to regard the fund as an accumulation. It is not, as its name might suggest, "a hoard, but a balance." [3] It has been defined as "the public revenue . . . as collected under the laws in force for the time being." [4] Such revenue, as collected, is paid into the Bank of England and lies there to the "account of His Majesty's Exchequer" until Parliament has authorised its expenditure.[5] Within recent years, it is interesting to note, there has been at least one instance of a partial reversion to the pre-1787 method of accounting, whereby specific revenues were appropriated to specific charges. By s. 3 of the Roads Act, 1920,[6] there was established the Road Fund, which was to be maintained by, *inter alia*, revenue arising from certain specified excise duties, and which was to be specifically applied for the purpose of Part II. of the Development and Road Improvement Funds Act, 1909.[7] Here is a modern instance of specific revenues being earmarked to a specific charge.

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[1] By the accession of Anne the debt was over 50 millions; by that of George III. over 130 millions; by 1815 over 840 millions; by 1914 over 700 millions (a reduction of about 100 millions having been effected in the nineteenth century); by 1917 over 3900 millions; by 1922 over 7700 millions, about which figure the debt still remains.

[2] 25 Geo. II. c. 27.

[3] 27 Geo. III. c. 13.

SECTION 3.—PRESENT FINANCIAL SYSTEM.[8]

SUBSECTION (1).—*Introductory.*

336. The existing forms of revenue and expenditure may best be studied from the abstract prefaced to the National Finance Accounts, which are published each year as a parliamentary paper.[1] It will be seen at a glance that both revenue and expenditure fall, each year, into the same broad categories, each of which has its special constitutional significance. In dealing with these categories it may be convenient to illustrate them by actual figures drawn from the Finance Accounts for the year 1928–9.[1] Thus in that year the approximate aggregates of revenue and expenditure were respectively £836,000,000 and £818,000,000.[2]

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[1] Anson, Law and Custom of the Constitution, vol. ii. pt. ii. p. 147.

[2] 27 Geo. III. c. 13.

[3] Anson, Law and Custom of the Constitution, vol. ii. pt. ii. p. 149.

[4] Maitland, Constitutional History, p. 441.

[5] Exchequer and Audit Act, 1866 (29 & 30 Vict. c. 39), s. 10.

[6] 10 & 11 Geo. V. c. 72.

[7] 9 Edw. VII. c. 47 ; the analogy to the pre-1787 method of accounting is not quite complete, because the excise duties, on their way to the Road Fund, first pass through the Consolidated Fund.

[8] GENERAL AUTHORITIES : Erskine May, Parliamentary Practice, 13th ed., chap. xviii. ; Anson, Law and Custom of the Constitution, vol. ii. pt. ii. chap. vii. ; Dicey, Law of the Constitution, chap. x. ; Campion, Introduction to the Procedure of the House of Commons, 1929, chap. viii. ; Hilton Young, System of National Finance, 2nd ed., 1924.

Subsection (2).—*Revenue.*

337. The present revenue is divided into two main categories: (*a*) Non-tax revenue, which at present forms rather more than one-fifth of the total revenue (£150,000,000); and (*b*) tax revenue, which forms rather less than four-fifths of the total revenue (£686,000,000). Non-tax revenue has four principal subdivisions:—

Government monopolies—the Post Office, Telegraph, and Telephone Services	£65,000,000 [3]
Crown Lands [4]	1,000,000
Receipts from Sundry Loans—War Loans to Allies, Loans for Post-war Reconstruction, Dividends from Suez Canal Shares	28,000,000
Miscellaneous Receipts	56,000,000
	£150,000,000

338. Tax revenue may be classified in several ways. As already stated,[5] taxation may be imposed only by authority of an Act of Parliament. This does not mean, however, that in each financial year statutes must be passed authorising each source of tax revenue for that year. Taxation is imposed in two ways; either by permanent or by yearly Acts of Parliament. The greater portion of the tax revenue of each year is imposed by permanent Acts. If Parliament were not to sit in any one year, those revenues would still flow into the Consolidated Fund. The remaining taxes are imposed annually. Of these, the principal is income tax. All the yearly taxes imposed in any one year are usually authorised by a single Act, viz. the Finance Act [1] of the year. Tax revenue has the following principal subdivisions:—[2]

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[1] *Cf.* The Finance Accounts for 1928–9; Parl. Papers (House of Commons), 1929, No. 1, 2nd July 1929. A shorter statement is that prepared in connection with the Budget. *Cf.* Parl. Papers (House of Commons), 1929, No. 84, 15th April 1929.

[2] Finance Accounts, 1928–9, pp. 6, 7. The figures are given to the nearest million.

[3] This figure represents gross receipts from these services (subject to certain minor deductions but not subject to the cost of administering these services). The supply services of 1928–9 (see *infra*) included a Post Office vote of £57,000,000, so that the net receipts from these services amounted to £8,000,000.

[4] *Cf.* the comparatively small revenue arising from this source, which historically is one of the earliest. As it is, the revenue from this source has, within recent years, increased considerably, through prudent management. On the Crown Lands, see Crown, Vol. V., *ante*, paras. 755, 756, 758–763. Crown lands, of course, do not include the private estates of the sovereign, *ibid.*

[5] Para. 325, *supra.*

Customs [3]	£119,000,000
Excise	134,000,000
Motor Vehicles Duties	25,000,000
Estate, etc. Duties,	81,000,000
Stamps	30,000,000
Land Tax, etc.	840,000
Income Tax	238,000,000
Super-tax	56,000,000
Excess Profits Duty	850,000
Corporation Profits Tax	850,000
	£685,540,000

SUBSECTION (3).—*Expenditure.*

339. No sum may be released from the Consolidated Fund for the public expenditure except by authority of an Act of Parliament. This does not mean, however, that, in each financial year, statutes require to be passed authorising the whole expenditure of that year. Expenditure is, in practice, authorised in two ways: (1) by permanent, and (2) by yearly Acts of Parliament. In the Finance Accounts of the year this is the principal classification of expenditure. Those forms of expenditure which remain more or less permanent charges upon the Consolidated Fund are designed "Consolidated Fund Services." Those charges which are authorised yearly by Parliament, the vote being initiated by the Commons in Committee of Supply, are called "Supply Services." Of the present public expenditure, approximately one-half is appropriated to each of the Consolidated Fund Services and Supply Services.[4]

340. The expenditure under the head of Consolidated Fund Services is subdivided into five principal forms:—

National Debt Services—		
Interest	£310,000,000	
Management	1,000,000	
Sinking Fund [5]	58,000,000	
Carry forward		£369,000,000

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[1] See para. 355, *infra.*

[2] The ratio of direct and indirect taxation was 64·18 : 35·82 in 1928–9, and 65·53 : 34·47 in 1929–30. *Cf.* Scotsman, 7th May 1930, p. 14.

[3] The number of customs duties declined sharply from 1200 in 1842 to less than 20 in 1908, since when it has again increased to approximately 50.

[4] This ratio is novel; the Consolidated Fund Services have grown much more rapidly within recent years, owing to the disproportionate extension of the National Debt.

[5] The Finance Act, 1928 (18 & 19 Geo. V. c. 17), s. 23, has consolidated previous sinking funds into the "New Sinking Fund (1928)" set up thereby.

Brought forward		£369,000,000
Road Fund[1]		21,000,000
Payments to Local Taxation Accounts		15,000,000
Payments to Northern Ireland Exchequer[2]		5,000,000
Other Consolidated Fund Services—		
Civil List[3]	£470,000	
Miscellaneous Services[4]	2,530,000	
		3,000,000
		£413,000,000

341. The Supply Services, which are the portion of the public expenditure voted yearly by Parliament, are divided up among the particular spending departments as follows:—

Army Votes		£41,000,000
Navy Votes		57,000,000
Air Votes		16,000,000
Miscellaneous Civil Votes		222,000,000
Customs and Excise Votes	£5,000,000	
Inland Revenue Votes	7,000,000	
		12,000,000
Post Office Vote[5]		57,000,000
		£405,000,000

The procedure by which this annual supply is considered and voted is dealt with in the succeeding paragraphs.

SECTION 4.—ANNUAL SUPPLY.

SUBSECTION (1).—*Generally.*

342. The administration and expenditure of the national revenue is vested in the Crown. It is, accordingly, the function of the Crown, acting on the advice of its responsible Ministers, to communicate to the House of Commons the financial needs of the Government. The House of Commons investigates those needs, and, having done so, votes the necessary supply. The vote is thereafter embodied in a statute. Thus in theory the modern process of granting supply retains its historical character. The Crown demands money; the Commons grant it; and the Lords formally assent to the grant.

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[1] See para. 335, *supra*.

[2] In virtue of s. 22 of the Government of Ireland Act, 1920 (10 & 11 Geo. V. c. 67), certain " reserved taxes " (customs, excise, income tax, etc.) levied in Northern Ireland are paid into the Consolidated Fund, from which, by s. 24, a sum equal to such " reserved taxes " is to be paid over to the Exchequer of Northern Ireland. There are other similar charges on the Consolidated Fund, created by s. 34 (1) of the Act of 1920, and by s. 1 of the Unemployment Insurance (Northern Ireland Agreement) Act, 1926 (16 Geo. V. c. 4).

[3] See CROWN, The Royal Revenue, Vol. V. p. 313, *ante*, and 10 Edw. VII. & 1 Geo. V. c. 28, which authorises the present Civil List.

[4] This subhead includes an interesting variety of big and small payments, *e.g.* not merely such payments as annuities to the Royal Family, the retired Speakers' pensions, and judicial salaries and pensions, which it is not desirable should be the subject of an annual vote ; but also such payments as the following : the salaries of the High Commissioner to the General Assembly of the Church of Scotland, Six Trumpeters, and the Hereditary and Deputy Keepers of Holyrood House (salaries formerly charged upon the hereditary revenues of the Scottish Crown), a pension to the descendant of Lord Nelson who presently holds the title, and payments to the Lord of the Liberty of Furness, and to the Poor Scholars of Oxford (£3, 1s. 6d.).

[5] See para. 337, *supra*, n. 3.

343. The demand for supply for each financial year is initiated in the speech from the throne at the opening of Parliament. Interjected between those passages of the speech which are addressed to both Houses, there occurs a passage addressed exclusively to the Commons, which usually runs thus:—"Members of the House of Commons, Estimates for the public service will be laid before you." [1] With a view to considering supply the House proceeds to appoint two committees—the Committee of Supply, and the Committee of Ways and Means. These committees are set up as soon as the address in answer to the King's Speech has been agreed to.[2] They are committees of the whole House, and their respective functions can best be summarised by setting forth the resolutions (passed without discussion) by which they are constituted. The resolution applicable to the Committee of Supply is in these terms: "That this House will to-morrow resolve itself into a Committee to consider of the Supply to be granted to His Majesty." [3] That applicable to the Committee of Ways and Means is in these terms:—"That this House will to-morrow resolve itself into a Committee to consider of the Ways and Means for raising the Supply to be granted to His Majesty." [3] In these two committees the financial duties of the House of Commons are mainly discharged.

Subsection (2).—*The Committee of Supply.*

344. In the last two months of every calendar year the various spending departments separately present estimates of their ordinary expenditure for the current year to the Treasury. These estimates are then considered by the Chancellor of the Exchequer, who may deal with them in several ways. If they are such as he can ask the House of Commons to vote, he approves of them. If, however, they are in his view excessive, he may refer them back for reconsideration to the departments concerned. If no agreement can thereupon be reached as to a reduction of the estimates, or if the estimates raise matters of general policy, the decision may be left to the Prime Minister or to the Cabinet. Once the estimates have been adjusted, they are presented for approval to the House of Commons, sitting as Committee of Supply.[4]

345. The ordinary estimates are divided into four parts or divisions, comprising the four branches of the public service, viz. the Army, the

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[1] *E.g.* King's Speech, 2nd July 1929, Hansard (H.C.), 1929-30, ccxxix. 48.

[2] Standing Order 14; Erskine May, Parliamentary Practice, 13th ed., p. 883.

[3] *E.g.* Hansard (H.C.), 1929–30, ccxxix. 1038.

[4] Anson, Law and Custom of the Constitution, vol. ii. pt. ii. pp. 152, 153.

Navy, the Air Force, and the Civil Service and Revenue Departments.[1] Each of these four branches of the estimates is itself broken up, for the purposes of presentation to the Committee of Supply, into, it may be, a large number of subdivisions, technically designed "votes." Besides the ordinary estimates, there are also special estimates or votes, which may be laid before the Committee of Supply. The most important of these special estimates or votes are the following:—(1) "Votes on account." It has been found in practice that, owing to congestion in parliamentary business, at the commencement of each new financial year on 1st April only a small provision has been voted for the requirements of that year. In virtue of the Exchequer and Audit Act, 1866,[2] sums unexpended at the close of the preceding year cannot be carried forward to the new financial year, but revert to the Exchequer. Accordingly, it becomes necessary to ask for a vote on account during the first quarter of every calendar year.[3] Votes on account may also be required where special provision for the continuance of the work of the spending departments becomes necessary in view of an impending dissolution.[4] (2) "Supplementary estimates." Where a further grant of supply becomes necessary for a service to which supply has already been voted, or where a fresh grant is required on account of a new source of expenditure, these are obtained by the presentation of supplementary estimates.[5] (3) "Excess grants." Where a spending department has carried expenditure beyond the amount voted to it, the deficiency may be made up by obtaining an excess grant, but the House of Commons has passed a resolution disapproving of departmental excesses and declaring that it is the "duty of the department . . . to take care that the expenditure does not exceed the amount placed at its disposal for that purpose." [6] (4) "Votes on credit." The purpose of these votes is to provide money for unexpected demands, such as the emergency of war, etc., which, on account of their magnitude or indefiniteness, cannot be specified with the precision required of an ordinary estimate.[7] (5) "Exceptional grants." These are grants of supply to meet expenditure which cannot be regarded as forming part of the ordinary service of the year.[8]

346. It is the function of the Committee of Supply to control the public expenditure by considering the grants required for the various spending departments upon the presentation of the estimates of that expenditure. Each grant is presented to the committee in a motion which specifies the amount to be granted and the particular service for which supply is asked. The form of motion is: "That a sum, not exceeding £ , be granted to His Majesty, to defray the charge which will come in course of payment during the year ending on the 31st day of March 19 , for" the object therein specified.[1] The effect of this motion is, not to authorise the issue of the sum voted from the Consolidated Fund, but merely to register the necessity for supply to that amount being granted. The Committee of Ways and Means [2] thereafter resolves that the amount be issued from the Consolidated Fund, and, when this latter resolution has been reported to the House, authority for issuing the amount is given by a statute.[3] As it is the function of the Crown to be responsible for public expenditure, practice forbids the committee from increasing any sum demanded by the Crown.[4] The Committee of Supply continues to sit intermittently until all the supply for the service of the year has been granted. When the committee is discharged, the financial arrangements of the year are completed by resolutions in the Committee of Ways and Means.

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[1] Erskine May, Parliamentary Practice, 13th ed., pp. 494, 521. [2] 29 & 30 Vict. c. 39.
[3] Erskine May, Parliamentary Practice, 13th ed., pp. 495–497. [4] *Ibid.*, p. 498.
[5] *Ibid.*, p. 500. [6] *Ibid.*, p. 501 (30th March 1849). [7] *Ibid.*, p. 502.
[8] *Ibid.*, p. 502. A recent instance is the exceptional grants of £585,000 in 1919 to certain admirals and generals for services rendered in the Great War. See Appropriation Act, 1919 (9 & 10 Geo. V. c. 88), Sched. B, pt. xx.

Subsection (3).—*The Committee of Ways and Means.*

347. This committee, which carries on its work concurrently with the Committee of Supply, has two functions: (*a*) to consider ways and means for raising the revenue necessary to meet the expenditure required for the service of the Crown during the current financial year, and (*b*) to vote the issue from the Consolidated Fund of the sums required to meet the grants voted by the Committee of Supply.

348. The primary function of the Committee of Ways and Means is to determine what revenue is necessary to meet the expenditure required during the current financial year, and to consider ways and means of raising that revenue. This part of the committee's work, accordingly, opens with a statement from the Chancellor of the Exchequer of the estimated expenditure of the year and of the revenue required to meet it—commonly known as "the Budget." This statement has not invariably been addressed to the Committee of Ways and Means; [5] but as the consideration of taxation necessary for the service of the year is the province of this committee, it has become the practice for the Chancellor of the Exchequer to present his Budget statement there. The Chancellor of the Exchequer usually introduces the Budget when moving the reimposition of one of the yearly forms of taxation, *e.g.* income tax.[6] Discussion upon this motion is, according to custom, not confined to the limited terms of the motion, but may traverse the whole field of the Chancellor's statement, and while in form a discussion of a specific motion, is in practice a financial review for the year. The Chancellor's statement indicates whether it is proposed to continue or vary existing taxation and whether it is proposed to introduce new forms of taxation or repeal old forms; and in pursuance of the statement, the committee then proceeds to consider resolutions submitted with a view to effecting the Budget proposals.

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[1] Erskine May, Parliamentary Practice, 13th ed., p. 529.

[2] See para. 347, *infra*.

[3] Either a Consolidated Fund Act or the Appropriation Act.

[4] Erskine May, Parliamentary Practice, 13th ed., p. 531.

[5] On 29th April 1915 the Chancellor of the Exchequer, on the motion for leave to bring in the Defence of the Realm (Amendment) (No. 3) Bill, anticipated part of his Budget statement which he made on 4th May; Erskine May, Parliamentary Practice, 13th ed., p. 539, n. 7.

[6] Before 1929 the Budget was usually introduced on the motion for the reimposition of the customs duty on tea. In 1929 this duty was repealed (Finance Act, 1929 (19 & 20 Geo. V. c. 21), s. 5), and the Budget of 1929 was introduced on a motion to reimpose income tax (Hansard (H.C.), 1929–30, ccxxvii. 68).

349. The legal effect of the committee's resolutions depends upon whether these resolutions (1) provide for the renewal or variation of an existing tax, or (2) provide for the imposition of a new tax. In neither case has the resolution of the committee the effect, *per se*, of warranting the imposition of the tax. The tax can be imposed only by statutory authority, and it has been held in the case of *Bowles* v. *Bank of England* [1] that income tax exacted merely on the authority of a resolution of the Committee of Ways and Means was illegally exacted and could be recovered. But in the case where the effect of the committee's resolution is to renew or vary an existing tax,[2] the committee may, in virtue of the Provisional Collection of Taxes Act, 1913,[3] secure immediate statutory effect for the resolution by including therein a declaration that it is expedient in the public interest that the resolution should have statutory effect under the provisions of that Act. A resolution which includes this declaration has statutory force for four months. It ceases, however, to have statutory force if it is not agreed to by the House within the next ten days on which the House sits after the resolution is passed in committee and also if a Bill embodying the resolution is not read a second time by the House within the next twenty days on which the House sits after the resolution is agreed to.[4] The resolution also ceases to have statutory effect if Parliament is dissolved or prorogued, or if an Act embodying the resolution comes into operation, or if the provisions giving effect to the resolution are rejected.[5] Again, if the resolution is modified by the House, it has effect as so modified.[6] The Act of 1913 does not apply to other resolutions to the same effect passed during the same session.[7] In the case of resolutions providing for the imposition of a new tax, the Act of 1913 does not apply, and, accordingly, the taxes voted by such resolutions are not exigible until authority to levy them is conferred by a taxing statute. But in such cases, if it becomes necessary to exact the new tax before the Act authorising its imposition can be passed, the practice is adopted, though without legal justification, of collecting the tax in anticipation of the authorising statute, and relying on the retrospective legalisation by that statute of the unauthorised assessments.[8]

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[1] [1913] 1 Ch. 57; see para. 326, *supra*.

[2] The Provisional Collection of Taxes Act, 1913 (3 Geo. V. c. 3), applies only to duties of customs and excise, and to income tax, s. 3.

[3] 3 Geo. V. c. 3, s. 1 (1).

[4] Sec. 1 (2).

[5] Sec. 1 (1) (*a*).

[6] Sec. 1 (1) (*b*).

[7] Sec. 1 (1) (*e*).

[8] For information as to this practice, see Erskine May, Parliamentary Practice, 13th ed., pp. 540, n. 3, and 541, n. 1.

350. A secondary function of the Committee of Ways and Means is to pass resolutions voting the issue from the Consolidated Fund of the sums required to meet the grants voted by the Committee of Supply. The procedure in voting these grants in the Committee of Supply has already been dealt with.[1] The Committee of Ways and Means thereafter resolves that the amount voted be issued from the Consolidated Fund. The usual resolution is in this form: "That towards making good the supply granted to His Majesty for the service of the year ending on the 31st day of March, 19 , the sum of £ be granted out of the Consolidated Fund of the United Kingdom."[2] Upon these resolutions, when agreed to by the House, are founded the Consolidated Fund Acts and Appropriation Act, which give statutory warrant for the several issues. The drafts upon the Consolidated Fund authorised by the Committee of Ways and Means must not exceed the amount of the grants already voted in the Committee of Supply. The Committee of Ways and Means sits until after the last grant has been voted by the Committee of Supply, and when it has resolved upon the issue of the sums necessary to meet that grant its work also ends, and upon its final resolution being agreed to by the House the Appropriation Bill is introduced.

SUBSECTION (4).—*Consolidated Fund Acts and Appropriation Act.*

351. After supply has been voted in the Committee of Supply and the issue from the Consolidated Fund of the sum necessary for supply has been resolved upon in the Committee of Ways and Means, statutory authority is still required to enable the issue to be made. This authority is given by a series of Acts passed each year, of which all but the last are called Consolidated Fund Acts, while the last is called the Appropriation Act.

(i) *Consolidated Fund Acts.*

352. Before the final supply for the year can have been voted some interim payments out of the Consolidated Fund are required to make good the earlier supply. The statutory authority for these interim payments is given by a Consolidated Fund Act. This is a short Act, the substantive provision of which always runs in such terms as these: "The Treasury may issue out of the Consolidated Fund of the United Kingdom and apply towards making good the supply granted to His Majesty for the service of the year ending on the 31st day of March, 19 , the sum of £ ."[3] The Act contains no direction as to how such issue shall be appropriated. At least one Consolidated Fund Act is always passed before 1st April. This Act authorises the issue of funds to meet the supplementary grants for the service of the year ending 31st March, and also authorises an issue to enable provision to be made for the carrying-on of government at the outset of the new financial year. Usually several Consolidated Fund Acts are passed each year, as many being passed as may be necessary to provide funds for the public service, until the final provision can be made in the Appropriation Act.

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[1] See para. 344 *et seq.*, *supra.*

[2] Erskine May, Parliamentary Practice, 13th ed., p. 545.

[3] *E.g.* 19 Geo. V. c. 2, s. 1.

(ii) *Appropriation Act.*

353. After all the supply for the year has been voted, the Appropriation Act is passed authorising the final issue of funds necessary for the public service. But the Appropriation Act, as its name implies, is much more than merely a concluding Consolidated Fund Act. In addition to authorising a final issue from the Consolidated Fund, it gathers up all the previous issues and appropriates the whole specifically to the various services. The substantive provisions of any Appropriation Act thus fall into two categories. In the first place, there is a provision authorising the final issue from the Consolidated Fund in terms similar to that quoted above from the Consolidated Fund Act.[1] In the second place, there is a provision directing the appropriation of this and all previous issues, which is in terms such as these: "All sums granted by this Act and the other [Consolidated Fund] Acts mentioned in Schedule A annexed to this Act out of the said Consolidated Fund towards making good the supply granted to His Majesty, amounting . . . to [then follows the total] are appropriated, and shall be deemed to have been appropriated as from the date of the passing of the Acts mentioned in the said Schedule A, for the services and purposes expressed in Schedule B annexed hereto." [2] Schedule A sets forth the previous Consolidated Fund Acts; and Schedule B, in fairly minute detail, the specific purposes to which the sums issued were, or are, appropriated.

354. The operation of these Acts is best illustrated by a concrete instance. In the session 6th November 1928–10th May 1929, the first Consolidated Fund Act was passed on 19th December 1928,[3] by which an issue of 1½ millions was authorised towards making good the supply for the service of the year ending 31st March 1929. On 27th March 1929 a second Consolidated Fund Act [4] was passed, authorising the issue of 2 millions towards making good the supply for the years ending 31st March 1928 [5] and 1929, and the issue of 170 millions for the year ending 31st March 1930. On 10th May 1929 the Appropriation Act [6] was passed, which first authorised the issue of another 252 millions for the year ending 31st March 1930, and then proceeded to appropriate the aggregated issues, in the case of the two earlier Acts retrospectively.

SUBSECTION (5).—*Finance Act.*

355. The Finance Act [7] of the year is the measure which gives final statutory authority for the taxation proposed in the Committee of Ways and Means. Certain of this taxation may have acquired provisional statutory authority in virtue of the Provisional Collection of Taxes Act, 1913.[1] As, however, the greater portion of taxation is authorised by permanent Acts, the total taxation that Parliament may authorise in the Finance Act of any one year may be comparatively little. Only in exceptional instances are there two Finance Acts in any one year.

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[1] *E.g.* 19 & 20 Geo. V. c. 22, s. 1.

[2] *Ibid.*, s. 3.

[3] 19 Geo. V. c. 2.

[4] 19 Geo. V. c. 10.

[5] The issue in respect of 1928 was to make good an excess in expenditure.

[6] 19 & 20 Geo. V. c. 22.

[7] So designed since 1894; before that it was called the Customs and Inland Revenue Act.

SUBSECTION (6).—*Control and Audit: The Comptroller and Auditor-General.*

356. It has been shewn above how Parliament authorises the issue of money from the Consolidated Fund and appropriates it specifically to the various services. It still remains to describe (*a*) the machinery for issuing funds; and (*b*) the method of securing that the funds issued are, in fact, spent on the purposes to which they have been appropriated.[2]

357. Even when the issue of sums from the Consolidated Fund has been duly authorised by Parliament, the sums are not thereby automatically withdrawn from the account of the Exchequer at the Bank of England. No sums may be withdrawn unless with the sanction of an independent official—the Comptroller and Auditor-General—whose duty it is to see that no money is paid out except under legal authority. The Comptroller and Auditor-General is an independent official responsible to the House of Commons, who can be removed from his office only by vote of both Houses of Parliament. Whenever payment of an authorised grant of supply is required, the Treasury (through which office alone public moneys are drawn) presents a requisition to the Comptroller and Auditor-General for the payment from the Exchequer Account of the sum required. Before granting credit for the sum the latter must ascertain that the demand made upon him has statutory authority.[3]

358. In addition to controlling the issue of funds from the Exchequer Account, the Comptroller and Auditor-General has the further duty of ascertaining that the sums issued are actually expended on the purposes to which they have been appropriated. It is his function to audit the public accounts and to inquire into the legality of the purposes for which public money has been spent. The public accounts, after being reported on by him, are remitted for consideration to the Public Accounts Committee of the House of Commons, which examines them and reports back to the House.[4] Should the committee report upon any excess of expenditure over supply, the attention of the spending department concerned is drawn to the irregularity by a Treasury Minute.

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[1] 3 Geo. V. c. 3; see para. 349, *supra*.

[2] Anson, Law and Custom of the Constitution, vol. ii. part ii. p. 156; Dicey, Law of the Constitution, p. 315.

[3] This machinery seems to savour of formality; but as to its practical significance see the case of Lord Grenville, 1811, referred to by Dicey, Law of the Constitution, p. 317.

[4] Erskine May, Parliamentary Practice, 13th ed., p. 557.

NATIONAL GALLERIES.

See OFFICERS AND DEPARTMENTS OF STATE.

NATIONAL HEALTH INSURANCE.

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SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*The Statutes.*

359. The important social service known as National Health Insurance, by virtue of which a large proportion of the employed workers throughout the country are compulsorily insured against sickness, came into being on 15th July 1912, as a result of Part I. of the National Insurance Act, 1911.[1] As was to be expected with a system that affected directly and intimately over 15,000,000 people and depended so much upon industrial conditions, amending Acts were, for a time at least, found necessary almost every year—and indeed at some times even more frequently—to meet difficulties which experience as well as the conditions obtaining during and subsequent to the Great War had brought to light. Apart from minor amendments contained in other Acts, Part I. of the Act of 1911 was amended by no less than twelve National Health Insurance Acts prior to 1924, when the then existing enactments of a permanent nature were consolidated in the National Health Insurance Act, 1924.[2] That Act has since been amended by Part I. of the Economy (Miscellaneous Provisions) Act, 1926,[3] which Part is, by s. 7 thereof, authorised to be cited as the National Health Insurance Act, 1926, and by the National Health Insurance Act, 1928,[4] as well as by the Widows', Orphans', and Old Age Contributory Pensions Acts, 1925 and 1929.[5] The Act of 1928 added a number of new subsections to sections of the Act of 1924, and made various verbal amendments in provisions of the Act of 1924. Subsequent references herein to sections of the Act of 1924 will be to the sections as amended by the Act of 1928 or by any other enactment. References to sections without mention of any Act are to sections of the Act of 1924.

360. By the Widows', Orphans', and Old Age Contributory Pensions Act, 1925,[6] the National Health Insurance system had superimposed on it the system of Widows', Orphans', and Old Age Contributory Pensions. Consequently every person insured for the purpose of National Health Insurance is also insured for the purpose of Contributory Pensions—though the converse is not true, for certain classes of persons are insured only for pensions purposes—and the contributions in respect of National Health Insurance and of Contributory Pensions are paid as one contribution by means of a single stamp upon one and the same contribution card. See PENSIONS.

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[1] 1 & 2 Geo. V. c. 55.

[2] 14 & 15 Geo. V. c. 38.

[3] 16 & 17 Geo. V. c. 9.

[4] 18 & 19 Geo. V. c. 14.

[5] 15 & 16 Geo. V. c. 70; and 20 Geo. V. c. 10.

[6] 15 & 16 Geo. V. c. 70.

SUBSECTION (2).—*Main Features.*

361.—The principal features of National Health Insurance are (1) the compulsory insurance against sickness of all employed persons working by way of manual labour and all the lower-paid non-manual workers, at the joint expense of the employed persons, the employers, and the State; (2) while the rates of contribution and benefits applicable to men and women are different, there are flat rates of contribution and benefits for all men and flat rates of contribution and benefits for all women, irrespective of their ages at the time of entry into insurance; (3) the insurance is provided by the insured persons themselves through the medium of societies approved for the purposes of the Acts, called Approved Societies, of which the insured persons are members; (4) as explained below under Finance,[1] a society is enabled to provide common rates of benefit for insured members at flat rates of contribution by reason only of having credited to them what are termed "reserve values," which are amounts estimated to represent the loss to the society by reason of the insured persons' ages at entry into insurance; (5) *ad hoc* bodies called Insurance Committees (containing representatives of insured persons, medical practitioners, and the county or town council) were set up by the Act of 1911 in each county or large burgh to administer medical benefit, which is one of the principal benefits. The systems of National Health Insurance and Contributory Pensions are complementary to each other. The principal cash benefits under National Health Insurance (sickness and disablement benefits) continue only until the insured person is 65, when the old age contributory pension emerges under the Contributory Pensions Acts.

SUBSECTION (3).—*Government Departments concerned.*

362. So far as Scotland is concerned, the system is under the general control of the Department of Health for Scotland (which is referred to throughout as "the Department"), established under the Reorganisation of Offices (Scotland) Act, 1928.[2] The Department is the successor of the Scottish Board of Health, which in turn, by the Scottish Board of Health Act, 1919,[3] took over the powers and duties of, *inter alios*, the Scottish Insurance Commissioners established under the Act of 1911. The Department acts under the directions of the Secretary of State for Scotland. The system of National Health Insurance originally applied uniformly throughout England, Scotland, Ireland, and Wales, except that there were separate Government Departments in each country to superintend and control its administration. Since the establishment of the Irish Free State by the Irish Free State (Agreement) Act, 1922,[4] and the Irish Free State Constitution Act, 1922,[5] the system so far as operating in the Free State has been divorced from that operating in the other countries, but s. 20 of the Act of 1924 authorises arrangement being made with the Free State authorities to secure continuity of insurance in the case of persons moving from the United Kingdom to the Free State, or *vice versa.*

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[1] See para. 492, *infra*.

[2] 18 & 19 Geo. V. c. 34.

[3] 9 & 10 Geo. V. c. 20.

[4] 12 Geo. V. c. 4.

[5] 13 Geo. V. (Session 2), c. 1.

363. The Government Departments in England, Wales, and Northern Ireland in charge of National Health Insurance are the Ministry of Health, the Welsh Board of Health (which is subject to the control of the Minister of Health), and the Ministry of Labour for Northern Ireland. In order to co-ordinate the work of these Departments and to make financial adjustments between the different countries, there has been established a Joint Committee called the National Health Insurance Joint Committee, consisting of the Minister of Health (who is chairman), the Secretary of State for Scotland, the Minister of Labour for Northern Ireland, and a person appointed by the Minister of Health, having knowledge and experience of National Health Insurance in Wales.[1] The Joint Committee may exercise, alone or jointly with the Departments, such powers conferred by the Act on the Departments as may be prescribed.[2] These powers mainly relate to financial and actuarial matters, or matters in regard to which uniformity is necessary or highly desirable.

SECTION 2.—INSURED PERSONS.

364. There are two classes of insured persons: (1) The employed person, known as the employed contributor, who is compulsorily insured; and (2) the voluntary contributor who, differing from the employed contributor, is or continues in insurance as a result of his own volition. No person under the age of 16 is insurable (s. 1 (1)), and a person who on attaining 65 is not insured is not thereafter capable of becoming insured (s. 3 (7)).

SUBSECTION (1).—*Employed Contributors.*

365. Every person employed within the meaning of the Act and within the insurable ages is compulsorily insured. Persons are employed within the meaning of the Act if they are engaged in any of the employments set out in Part I. of the First Schedule to the Act of 1924, not being employments set out in Part II. of that Schedule (s. 1 (2)).

(i) *Insurable Employments.*

366. The most important of the employments specified in Part I. is the first, which is of a general character and is as follows: "Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether express or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment." The most important of the exceptions in Part II. is that contained in paragraph (*k*): "Employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value £250 a year, or in cases where such employment involves part-time service only at a rate of remuneration which, in the opinion of the Department, is equivalent to a rate of remuneration exceeding £250 a year for whole-time service." The effect of reading this exception along with the first class of employment specified in Part I. is, broadly speaking, to divide all employed contributors into two classes, viz.: (1) those who are employed by way of manual labour under a contract of service whatever their wages may amount to; and (2) those who are employed under a contract of service otherwise than by way of manual labour at a rate of remuneration not exceeding £250 a year. It must be noticed, however, that the £250 in the second class is not necessarily determined by the actual wage or salary received, but by the rate of remuneration for full-time service for a whole year. In the case of a person employed only part-time, it depends upon what the Department determines to be the rate if that person were employed full-time.

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[1] Act of 1924, s. 88.

[2] Sec. 88 (3).

367. The Act does not define "contract of service" or "employer," but these have been the subject of judicial construction in connection with the Health Insurance Acts and other Acts, such as the Workmen's Compensation Acts. There cannot be a "contract of service" without the relation of master and servant.[1] Similarly the expression "manual labour," occurring as it does in the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, has been the subject of judicial interpretation.[2]

368. The employment must be in the United Kingdom (that is in England, Scotland, Wales, or Northern Ireland).[3] Under paragraph (*b*) of Part I. of the First Schedule there is included amongst insurable employments, employment under a contract of service or apprenticeship as master or a member of the crew of any ship registered in the United Kingdom or of any other British ship or vessel of which the owner or, if there is more than one owner, the managing owner resides or has his principal place of business in the United Kingdom. Though for some purposes a British ship may be regarded as part of the United Kingdom it is not so for the purpose of National Health Insurance, and any person employed otherwise than as a master or member of the crew on a British ship is not employed within the meaning of the Act.[1]

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[1] Cf. *Simmons* v. *Heath Laundry Co.*, [1910] 1 K.B. 543; *Hayden* v. *Dick*, 1902, 5 F. 150; *Chisholm* v. *Walker & Co.*, 1909 S.C. 31; *Doharty* v. *Boyd*, 1909 S.C. 87; *Walker* v. *Crystal Palace Football Club*, [1910] 1 K.B. 87; *Scottish Insurance Commrs.* v. *Edinburgh Royal Infirmary*, 1913 S.C. 751 (resident physicians and surgeons, non-resident house physicians and surgeons, clinical assistants and supervisors of administration of anæsthetics are not employed by the Infirmary under contract of service); *Scottish Insurance Commrs.* v. *Church of Scotland*, 1914 S.C. 16 (assistant ministers and student missionaries are not, but lay missionaries are, employed under contract of service); *Scottish Insurance Commrs.* v. *M'Naughton*, 1914 S.C. 826 (share fishermen and net share fishermen, being by custom liable in a share of any loss, are not employed by the owner of the vessel under contract of service, but see Schedule I. Part I. para. (*g*)); *In re Employment of Poor Law Officers*, 1913, 47 Ir. L.T. 28; *Hogarth* v. *Scottish Board of Health*, 1926, S.L.T. 96; *Park* v. *Wilsons & Clyde Coal Co., Ltd.*, 1929 S.C. (H.L.) 38.

[2] Cf. *Cook* v. *North Metropolitan Tramways Co.*, 1887, 18 Q.B.D. 683; *Bagnall* v. *Levinstein*, [1907] 1 K.B. 531; *In re Dairyman's Foreman* and *re Tailors' Cutters*, 1912, 28 T.L.R. 587; *In re Lithographic Artists: re Engravers*, 1913, 29 T.L.R. 440; *Jacques* v. *Owners of Steam Tug "Alexandria,"* 1921, 14 B.W.C.C. 148.

[3] 17 Geo. V. c. 4.

369. As regards the inclusion amongst insurable employments of employment under contract of apprenticeship, the apprentice is a person who engages to serve a master for a determinate number of years on condition that the master instructs him in the knowledge of his trade or handicraft. The contract between the master and the apprentice, though it includes a contract to work for hire, is primarily a contract to teach and to learn a certain trade or handicraft. In Scotland such a contract can be constituted only by writing,[2] and is not binding unless it be probative or followed by *rei interventus*. Paragraph (*a*) of Part I. of the First Schedule refers to any contract of service or apprenticeship whether written or oral. It is thought that the reference to oral contracts does not apply to a contract of apprenticeship in Scotland, and that any so-called apprentice working under an arrangement not reduced into writing is not in law an apprentice. Paragraph (*a*) excludes employments in the case of a contract of apprenticeship where there is no money payment. In *The Society of Accountants in Edinburgh* v. *Lord Advocate*[3] it was held that the exception did not apply, and the employment was therefore insurable, where payments were made quarterly by the employer, although there was no legal obligation on him to make the payments.

370. The other types of employment within the meaning of the Act are: (1) Employment in the United Kingdom as an outworker, except in so far as the employment is excluded by Special Order. Outworkers are defined as persons to whom articles or materials are given out by a person to be made up, etc. for the purposes of the trade or business of that person in their own homes or other premises not under the control of that person, who is deemed to be the employer; (2) employment in the United Kingdom under any local or other public authority, except in so far as excluded by Special Order (paragraph (*d*)). Many of the officials of local authorities are not employed under contract of service. As in the case of other employments, this employment is subject to the exception that any person employed otherwise than by way of manual labour at a rate of remuneration exceeding for whole-time service £250 a year is not employed within the meaning of the Acts; (3) employment in the United Kingdom in plying for hire with any vehicle or vessel, the use of which is obtained from the owner under a contract of letting to hire, in consideration of the payment of a fixed sum or a share in the earnings—the owner being deemed to be the employer (paragraph (*e*)). The persons so employed are not employed under a contract of service; [1] (4) employment in the United Kingdom by way of manual labour under a contract for the performance of such labour for the purpose of any trade or business except so far as excluded by Special Order, the person for whose trade or business the labour is performed being deemed to be the employer (paragraph (*f*)). This class of employment, which was first made insurable by the Act of 1928, covers such cases as contractors for ditching, roadmaking, etc., who are not employed under contract of service. By Special Order [2] there has been excluded employment of a casual nature where the person employed carries on business at premises occupied by him, and performs the manual labour for the purposes of such business; (5) employment as master or member of the crew of a fishing or other vessel registered in the United Kingdom, or any other British vessel of which the owner or, if there is more than one owner, the managing owner or manager resides or has his principal place of business in the United Kingdom, where the person so employed is remunerated by a share in the profits or gross earnings of the vessel, except in so far as the employment is excluded by Special Order (paragraph (*g*)). The owner of the vessel, or, if there is more than one owner, the managing owner or manager, is to be treated as the employer, but this may be modified by the provisions of the Special Order. This class of employment also first became insurable as a result of the Act of 1928. By Special Order [3] there is excluded employment where the person employed is remunerated solely by the receipt in kind of a share of the catch of the vessel.

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[1] *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Co., Ltd.*, [1912] 2 K.B. 299.

[2] *Murray*, 1863, 4 Irv. 466, per Lord Justice-Clerk Inglis; *Grant* v. *Ramage & Ferguson*, 1897, 25 R. 35.

[3] 1924, S.L.T. 194.

371. In connection with the employment of persons on British ships (see paragraphs (*b*) and (*g*)), s. 20 authorises the making of arrangements with the Irish Free State whereby insurance, both under the Acts as applicable to the United Kingdom and under the Acts as applicable to the Free State, is not required in the case of a ship registered in the one country where the owner or managing owner resides in the other. Under these arrangements it is the country in which the ship is registered which determines under which insurance system the men are to be insured.[4]

(ii) *Exceptions from Insurable Employments.*

372. The exceptions to compulsory insurance are to be found in Part II. of the First Schedule. These exceptions fall broadly into three classes: (1) those employments which are excepted without qualification; (2) those employments by virtue of which the persons employed therein are already entitled to benefits similar to those conferred by the Act, where the employments are excepted if the Department certifies accordingly; and (3) those employments which may be excepted by Special Order made by the Department.

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[1] *Dogget* v. *Waterloo Taxi-cab Co., Ltd.*, [1910] 2 K.B. 366.

[2] S.R. & O., 1928, No. 1049.

[3] *Ibid.*, No. 1050.

[3] *Ibid.*, 1924, No. 208.

373. The first class comprises persons in the naval, military, or air service of the Crown and in the Officers' Training Corps, except as provided in ss. 57 to 61 (paragraph (*a*)); teachers to whom a scheme under the Education (Scotland) Superannuation Act, 1919,[1] applies, or persons employed in State-aided schools as students provisionally recognised for temporary service as uncertificated teachers pending completion of training (paragraph (*e*)); teachers in State-aided schools after having undergone examination to qualify as certificated teachers and before the announcement of the result of the examination (paragraph (*g*)); commission agents who, if employed by one employer, are dependent for their livelihood on their earnings from some other occupation or, if employed by more than one employer, are not mainly dependent on any particular one (paragraph (*i*)); employment without wages or other money payment on an agricultural holding; employment without wages or other money payment where the employer is the parent or maintains the employed person (paragraph (*j*)); employment of a casual nature otherwise than for the purposes of the employer's trade or business; employment of a casual nature for the purposes of any game or recreation, unless the employed person is engaged or paid through a club (paragraph (*l*)); husbands employed by wives and wives employed by husbands (paragraph (*p*)). Provision is made for the exclusion of employment as an outworker, where the outworker is the wife of an insured person and is not wholly or mainly dependent for her livelihood upon the employment, but this class of employment has been brought back into insurance by virtue of an Order made under the proviso to s. 1 (2) of the Act.[2]

374. The second class of exceptions comprises employees of the Crown or of local or public authorities and clerks or other salaried officials in the service of railway or other statutory companies where the clerks or salaried officials are entitled to rights in a statutory superannuation fund (paragraphs (*b*) and (*c*)). Such persons are excepted only if, on application, the Department certifies that the terms of their employment are such as to secure "provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by the Act."

375. The third class of exceptions comprises employments of a class specified in a Special Order, which are ordinarily adopted as subsidiary and not as the principal means of livelihood (paragraph (*m*)).[2] It is important to keep in view that this exception does not exclude an employment because it happens to be the subsidiary occupation of the particular person employed, nor is a person employed within the meaning of the Act by reason of being employed in an employment specified in the Special Order because it happens to be his principal means of livelihood. Employment as a member of the crew of a fishing vessel remunerated by shares in the profits or gross earnings of the vessel may be excluded by Special Order, but no such Order is in operation in Scotland (paragraph (*o*)).

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[1] 9 & 10 Geo. V. c. 17.

[2] The National Health Insurance Employment (Exclusion and Insurance) Order (Scotland), 1924 $\left(\text{S.R. \& O., 1925, No. } \frac{289}{\text{S. 32}}\right)$.

376. Section 15 (7) (*a*) of the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, provides that where a person has retired from an employment in respect of which no contributions are payable under that Act because of rights not less favourable than the pension rights under that Act, *e.g.* a policeman, he is not capable of becoming an insured person under the National Health Insurance Acts notwithstanding his entering any insurable employment.

377. By virtue of the proviso to s. 1 (2) of the Act of 1924 persons employed in any of the excepted employments may by Special Order made by the Department, with the approval of the Treasury, be included within the scope of compulsory insurance as employed persons, either unconditionally or subject to conditions specified in the Order. As a result of such an Order,[1] persons employed as pack shepherds are included amongst the persons employed within the meaning of the Act.

378. With regard to the above exceptions the following points deserve notice: (1) Employed persons who receive no wages or other money payment are excepted from insurance only if they are (*a*) apprentices, or (*b*) employed on agricultural holdings, or (*c*) the children of or maintained by the employers. The expression "agricultural holding" is not defined in the Act, but see the definition in s. 49 of the Agricultural Holdings (Scotland) Act, 1923.[2] (2) Employment of a casual nature is excepted from compulsory insurance only if it is neither for the purposes of the employer's trade or business nor for the purposes of any game or recreation where the person employed is engaged or paid through a club. The expression "employment of a casual nature otherwise than for the purposes of the employer's trade or business" occurs in the Workmen's Compensation Act, 1925, s. 3,[3] and has been the subject of judicial interpretation.[4] (3) Exceptions under the second head depend on certificates granted by the Department, which is the sole arbiter as to the sufficiency of the terms of the employment. (4) On the other hand, the third class of exceptions depends on a Special Order, the draft of which must be published and which, if objection is taken, can be made only after a public inquiry. Moreover, it has to lie before Parliament for 30 days before it comes into operation (s. 94).

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[1] The National Health Insurance Employment (Exclusion and Insurance) Order (Scotland), 1924 $\left(\text{S.R. \& O., 1925, No. }\frac{289}{\text{S. 32}}\right)$.

[2] 13 & 14 Geo. V. c. 10.

[3] 15 & 16 Geo. V. c. 84.

[4] *Hill* v. *Begg*, 1908, 24 T.L.R. 711; *Rennie* v. *Reid*, 1908 S.C. 981; *Knight* v. *Bucknill*, 1913, 6 B.W.C.C. 160; *Stoker* v. *Wortham*, 1919, 12 B.W.C.C. 34; *Williams* v. *Haigh*, 1925, 18 B.W.C.C. 549.

(iii) *Questions as to Employments.*

379. Any question as to whether an employment or class of employment is employment within the meaning of the Act, or whether a person is or was an employed person, or as to who is or was the employer of an employed contributor, is to be determined by the Department. The Department is final as to facts, but any person aggrieved by its decision may appeal on questions of law to a Judge of the Court of Session selected for the purpose, whose decision is final (s. 89 (1)). The Department may, on new facts being brought to its notice, revise any decision previously given by it (s. 79 (2)).

(iv) *Exemptions.*

380. Apart from the exceptions from insurable employment, it is open to any person employed within the meaning of the Act, by virtue of s. 2, to obtain from the Department a certificate exempting him from the liability to be insured under the Act if he is able to prove that (*a*) he has a pension or income of £26 a year or upwards not depending on his personal exertions, or (*b*) he is ordinarily or mainly dependent for his livelihood on some other person or on his own earnings from a non-insurable occupation, or (*c*) he has not been employed within the meaning of the Act for the prescribed number of weeks during any prescribed period (18 weeks in a contribution year).[1] The position of an exempt person differs from that of the person who is in an excepted employment. No National Health Insurance contributions whatsoever are payable in respect of the excepted person. In the case of the exempt person, he is exempted from paying his own share of the contribution but the employer has to pay his share (s. 6). As explained under Medical Benefit,[2] these contributions paid by the employers are applied in providing exempt persons with medical benefit (s. 12 (5)). For the purposes of National Health Insurance, the exempt is not an insured person.

SUBSECTION (2).—*Voluntary Contributors.*

381. Except for a very limited number of classes of persons, the only persons who may be insured as voluntary contributors are those who, having been insured, wish to remain insured after ceasing to be employed within the meaning of the Act. A married woman, however, cannot be a voluntary contributor (s. 56 (4)). It is open to any person who has been employed within the meaning of the Act and insured as an employed contributor for a period of 104 weeks, whether continuous or not, and has ceased to be so employed, to give notice within the prescribed time and in the prescribed manner that he desires to become a voluntary contributor (s. 1 (3) (*a*)). The normal time for giving notice is any time within the period during which he would remain insured after ceasing to be employed if he did not become a voluntary contributor (s. 3 (1)). It will be observed that the 104 weeks of employment need not be continuous, but they must occur within one period of insurance.[1] This follows from s. 3 (8), which provides that if a person ceases to be insured and again becomes insured he is treated as if he had not been previously insured.

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[1] The National Health Insurance (Exempt Persons) Amendment Regulations, 1929, Provisional Rules and Orders, 1929.

[2] See para. 411, *infra*.

382. The following may also be voluntary contributors: (1) Persons who were insured as voluntary contributors when the National Health Insurance Act, 1918, came into force, by virtue of the qualifications previously in force which were then repealed; (2) persons who became voluntary contributors under ss. 13 (1), 13 (4), 14 (5), and 15 (5) of the Contributory Pensions Act of 1925, or under ss. 9 and 21 of the Contributory Pensions Act of 1929. Sec. 13 (1) of the Act of 1925 gave persons who, having the necessary qualification of 104 weeks of employment, had not availed themselves of the opportunity they had, when they ceased to be insurably employed, of becoming voluntary contributors, and were not insured at the commencement of that Act, another opportunity of doing so with a view to their obtaining the benefits of contributory pensions. Sec. 13 (4) of the Act of 1925 enables an uninsured man who marries an insured woman in respect of whom 104 weekly contributions have been paid under that Act to become a voluntary contributor. Under s. 14 (5) of the same Act exempt men who are insured for the purposes of widows' and orphans' pensions, though not of National Health Insurance, may, if 104 contributions have been paid in respect of them, become voluntary contributors on ceasing to be exempt. So also, under s. 15 (5) of the 1925 Act, persons employed in employments excepted under certificates given under paragraphs (*b*) or (*c*) of Part II. of the First Schedule to the National Health Insurance Act of 1924 (other than persons in respect of whom no pensions contributions were payable) may become voluntary contributors on ceasing to be so employed. Sec. 21 of the Act of 1929 allowed persons to become voluntary contributors who were not able to become voluntary contributors under s. 13 (1) of the Act of 1925 because they were insured at the time, and also persons at any time while they are employed in any of the last-mentioned excepted employments.

383. A voluntary contributor must pay 45 contributions in each contribution year (July to July), but if, on attaining 60 in the case of a man, or 55 in the case of a woman, the voluntary contributor has been continuously insured for ten years or since 15th July 1912, whichever is the shorter period, 26 contributions suffice. If the necessary 45 or 26 contributions are not paid he ceases to be entitled to pay contributions (s. 7 (5)), and, as after explained,[1] after a period of something between 18 months and 2 years will cease to be insured (s. 3 (2)). For this purpose contributions are treated as paid for weeks while the insured is incapable of work due to sickness duly notified to the society (s. 7 (5)).

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[1] *Thomson* v. *Scottish Board of Health*, 1929, S.L.T. 105.

384. A question as to whether a person is entitled to become a voluntary contributor falls to be determined by the Department of Health, subject to a right of appeal to a judge of the Court of Session on a question of law (s. 89 (1) (*a*)).

SUBSECTION (3).—*Continuity of Insurance.*

385. So as to prevent persons lapsing from insurance immediately on ceasing to be employed, s. 3 of the Act of 1924 provides that a person insured as an employed contributor and a member of an approved society shall, on ceasing to be employed, continue to be insured for all purposes and entitled to all the benefits until the 30th June or the 31st December next preceding the expiration of two years from the end of the contribution week in which he ceased to be employed, and if, on ceasing to be employed, he is incapable of work by reason of sickness duly notified to his society, the period of two years does not commence to run until he ceases to be incapable of work. Thus a person ceasing to be insurably employed in the contribution week ending 3rd November 1929 will remain insured for all purposes until 30th June 1931. As previously mentioned, he may, if qualified, elect to become a voluntary contributor any time before the last-mentioned date. Similarly a voluntary contributor who ceases to pay contributions remains insured for the like period, the *terminus a quo* being the end of the contribution week in respect of which the last contribution was paid.

386. The Act of 1928 made further provisions by way of amendment of s. 3 of the Act of 1924, so as to enable insured persons (other than voluntary contributors) who were genuinely unemployed to remain in insurance even after they would otherwise cease to be insured. Under s. 3 (3) of the Act of 1924 as amended, where a person insured as an employed contributor for 208 weeks, and in respect of whom 160 contributions have been paid,[2] proves that throughout the period during which he has remained insured after ceasing to be employed he was, except when incapable of work by reason of notified sickness, available for but unable to obtain employment, he continues to be insured for another year subject to a reduced rate of sickness benefit and disablement benefit. If any person, while remaining insured under the last-mentioned provision, again becomes employed or becomes a voluntary contributor he does not lose any of the rights under his old insurance, but as regards sickness, disablement, and maternity benefits in respect of his new insurance he is treated as if he had not been insured until he has been employed for 26 weeks and 26 contributions have been paid in respect of him, or, if a voluntary contributor, until he has paid 26 contributions (s. 3 (4)). A person who when he ceased to be employed was 60 years of age or upwards, and had then been continuously insured for ten years or more, is entitled to further privileges by way of continuing him in insurance. If at the end of the extended year under s. 3 (3) he is still unemployed and can prove that throughout that extended year he was, except when incapable of work, available for but unable to obtain employment, he continues to be insured for another year, and so on from year to year, but without the right to sickness or disablement benefit (s. 3 (5)). This has the important result that, although he may not get these cash benefits, his insurance is kept alive for the purpose of his contributory old age pension, which will become payable on his attaining 65 (see PENSIONS).

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[1] See para. 385, *infra*.

[2] S.R. & O., 1929, No. 433.

387. No one who has been incapable of work by reason of notified sickness ceases to be insured until he has recovered from his incapacity for more than four weeks (s. 3 (6)). Accordingly if at the end of any of the periods mentioned a person is incapable of work he will remain insured for four weeks after his recovery, and if he were to fall ill again within that period he would still continue to be insured.

388. A person who is insured on attaining 65 remains insured for life, no matter what his position may thereafter be (s. 3 (7)). Sec. 3 (8) contains a most important provision by virtue of which a person who ceases to be insured is, if he subsequently becomes insured whether as a voluntary contributor or as an employed contributor, treated as if he had not been previously insured. In other words, he cannot for any insurance purpose found on any previous insurance or on any employment in the course of that insurance.[1]

389. If a person gets a week's employment at any time while he remains insured the various provisions above referred to, beginning with s. 3 (1), again come into operation, so that a person will remain in insurance if he obtains employment once every 18 months. Of course he may suffer reduction or even loss of benefits owing to arrears of contributions. The Act of 1928 repealed the National Health Insurance (Prolongation of Insurance) Act, 1921,[2] but provision has been made by regulations under s. 23 of the Act of 1928,[3] whereby persons who remained insured until 31st December 1928, by reason of the Act of 1921, will, subject to proving inability to obtain employment while not incapable of work, continue in insurance until 31st December 1930.

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[1] *Thomson* v. *Scottish Board of Health*, 1929, S.L.T. 105.

[2] 11 & 12 Geo. V. c. 66.

[3] The National Health Insurance (Transitional) Regulations, 1929, S.R. & O., 1929, No. 830, and the National Health Insurance (Transitional) Amendment Regulations, 1929, Provisional Rules and Orders, 1929.

SECTION 3.—CONTRIBUTIONS.

SUBSECTION (1).—*Rates and Rules for Payment.*

390. As already mentioned, one of the principal features of the scheme of National Health Insurance is that a flat rate of contribution is payable in respect of all men (9d. per week), and a flat rate in respect of all women (8½d. per week), without regard to their age at entry into insurance or their state of health, employment, or remuneration.[1] The weekly contribution is divided into two parts—(1) the employer's contribution, and (2) the contribution on behalf of the employed contributor—but both of these are payable in the first instance by the employer (s. 7 (2)). Of the weekly contribution, 4½d. is payable by the employer in the case of both men and women, and 4½d. in the case of a man and 4d. in the case of a woman by the employed person, except where the employed person is a low-wage earner, when the employer pays a larger portion of the weekly contribution. A low-wage earner is a person of the age of 18 or upwards whose remuneration does not include board and lodging, and the rate of whose remuneration does not exceed 4s. a working day. Where the rate does not exceed 3s. a working day, the employer pays the whole contribution, and where it exceeds 3s. but does not exceed 4s., the employer pays 5½d.[2] As to the method of ascertaining the rate of remuneration per working day see the undernoted case.[3] Where the employed person is not paid wages or other money payment by the employer or any other person the whole contribution is payable by the employer (s. 9 (4)). Sec. 5 (3) authorises the making of a Special Order varying the rates of contribution in the case of a trade or business of a seasonal nature and subject to periodical fluctuation, but in Scotland no such Order has been made.

391. In the case of the employed contributor, contributions are payable for every week during the whole or any part of which the employed person is employed, but the scheme does not require payment of contributions otherwise. If, however, contributions are not paid for weeks (other than those for which contributions are payable or are excused as mentioned below under Arrears [4]), the insured person is deemed to be in arrears and may suffer a reduction or loss of benefits. The week for the purposes of payment of contributions means the week commencing from the midnight between Sunday and Monday (s. 132 (1)).

392. In the case of the voluntary contributor the rate of weekly contribution is the same as in the case of the employed contributor (s. 5 (2)), but of course the whole contribution is payable by the contributor himself. A voluntary contributor whose total income from all sources exceeds £250 a year is not entitled to medical benefit (s. 12 (3)), and on that account the weekly rate of contribution payable in his case is reduced by 3d.—that is, in the case of a man, his National Health Insurance contribution is 6d. per week (s. 5 (2) prov.). Every voluntary contributor must pay contributions for such number of weeks in each contribution year as together with weeks during which he has been incapable of work owing to a disease or disablement, duly notified to his society, will make up 45 or 26 where he, on attaining 60 in the case of a man, or 55 in the case of a woman, had been continuously insured for ten years or since 15th July 1912 (s. 7 (5)). If he does not pay the requisite number he ceases to be entitled to pay contributions, and will within a limited period cease to be insured as explained above.[1]

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[1] Schedule II. as amended by the Contributory Pensions Act, 1925, Schedule IV., Part I.

[2] Schedule II. as amended by the Act of 1925, Schedule IV., Part I.

[3] *Don Bros., Buist & Co., Ltd.* v. *Scottish Insurance Commrs.*, 1913 S.C. 607.

[4] See para. 426, *infra.*

393. In the case of an exempt person, the employer is liable to pay 4½d. per week, which is ordinarily the same contribution as he would have had to pay if his employee had not held a certificate of exemption (s. 6 (1)).

394. Any question as to the rate of contribution payable for an insured person or as to the incidence thereof between the employer and the employee is to be determined by the Department, whose decision is final (s. 89 (1) (*b*) and (*c*)).

395. All contributions under the National Health Insurance Acts cease to be payable in respect of any employed person or voluntary contributor on his attaining the age of 65 (s. 7 (3)), but it is right to point out that contributions are payable under the Contributory Pensions Act (s. 9 (1) (ii)) by employers only in respect of employed persons who have attained that age. The contributions for National Health Insurance and Contributory Pensions are payable as one contribution.[2] For the combined rates of contributions in respect of National Health Insurance and Contributory Pensions, and their incidence as between employers and employees, see PENSIONS.

396. The manner and time of payment of contributions, including all matters incidental thereto, are provided for in regulations made under ss. 7 and 8 of the Act. The regulations in force at 31st January 1930 are the National Health Insurance (Collection of Contributions) Regulations (Scotland), 1924,[3] and the National Health Insurance and Contributory Pensions (Collection of Contributions) Regulations (Scotland), 1925.[4] In terms of s. 8 the regulations provide for the contributions being paid by means of an adhesive stamp (which may be purchased at a post office) being affixed to the contribution card of the contributor. To give effect to the provision that National Health Insurance and Contributory Pensions contributions are to be paid as one contribution the stamp includes both contributions.

397. It is only possible within the limits available to indicate a few of the more important provisions of the regulations. They require the contributor to obtain a contribution card from his approved society or, in the case of a deposit contributor, from the Department. It is his duty upon becoming employed to obtain from his approved society or, if he is not a member of an approved society, from the Department, and produce to his employer, a contribution card, and he is bound also, whenever required, to deliver the card to his employer for the purpose of its being stamped. It is the duty of the employer to stamp the card before payment of wages—the stamp covering the period in respect of which the wages are paid. The card has normally a currency of 26 weeks, but occasionally it runs for 27 weeks. In practice the card remains in the custody of the employer during its currency. At its expiration the employer returns it to the employed person, who in turn surrenders it to his society, or, if he is a deposit contributor, to the Department—receiving either at the same time or previously a fresh contribution card for the ensuing period. In addition to stamping the contribution card on or before the payment of wages, the employer is bound within six days of its expiration to stamp it for the period of its currency—assuming, of course, the person still remains in his employment; and where the employment terminates he is bound to stamp for the period of the employment. The employer may also be called on to stamp on receiving 48 hours' notice from the employed person (Article 8). Where wages or other pecuniary remuneration are not paid by the employer, he is bound to stamp on the first day in the week (Article 9). If the employed person fails to deliver a card to his employer, the latter is required to obtain from a post office a card called an emergency card, and to stamp it and hand it over to the employed person. The voluntary contributor obtains his contribution card from his society or the Department and is bound to stamp it weekly. He has to surrender it to his society or the Department on its expiration just like the employed contributor, receiving a new contribution card either then or previously. Every society is required to provide its member with a Record Card giving particulars of the cards surrendered and the stamps thereon (Article 34). As the wages of most employed persons are paid weekly, it follows that most contributions are payable weekly, but the regulations authorise employers having a large number of workers to deposit with the Department a sum of money to cover the amount of contributions payable, and, where this is done, the employers have to stamp only once in respect of the currency of each contribution card (Article 9 (3)).

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[1] See para. 385 *et seq.*, *supra.*

[2] Contributory Pensions Act, 1925, s. 10 (1).

[3] S.R. & O., 1924, No. $\frac{1504}{\text{S. }87}$.

[4] *Ibid.*, 1925, No. $\frac{1455}{\text{S. }107}$.

398. The general rules as to payment of contributions are contained in s. 9 of the Act of 1924. A weekly contribution is payable for every week during the whole or any part of which a person is employed (s. 9 (1)), but if during the week while he remains employed he renders no services, and either no remuneration is paid to him in respect of the week, or he is in receipt of sickness or disablement benefit for the whole or any part of the week, then no contribution is payable for the week (s. 9 (1) prov.). It is not enough only that no work should be done.

A contribution is payable if remuneration for the week is paid. If a contribution has been paid for a week, no further contribution is payable for the same week (s. 9 (1) prov.). The employer who has paid a contribution is entitled, notwithstanding the provisions of the Truck Acts, to deduct from the employed person's wages or remuneration the latter's share of the contribution. He is, however, entitled to recover from wages or other remuneration only the employed person's share of the contribution relating to the period for which the wages or remuneration is paid (s. 9 (2)). Where, as in such a case as that of an hotel waiter, an employer is not liable in payment of any money remuneration to an employed person, he is given the right to recover from the employed person his share of the contribution by civil proceedings at any time within three months (s. 9 (3)); but in the case of the contributor who does not receive any wages or money payment from the employer or any other person (*e.g.* whose remuneration consists only of a house rent free), the employer has no right of recovery against the employed person but has to pay the whole contribution himself (s. 9 (4)).

399. Where a person is employed by more than one employer in a week, the first employer in the week is liable to pay the contribution; but in the case of a person regularly employed by several employers in each week, the employers may arrange amongst themselves that they will pay for each week in an agreed rotation.[1] Where employed contributors work under the general control and management of some person other than their immediate employer, such as the owner, agent, or manager of a mine or quarry, or the occupier of a factory or workshop, that person may for the purposes of payment of contributions be treated as the employer of the employed contributors.[2]

400. It is not competent for an employer to make an agreement with an employed person whereby the employed person shall pay the employer's contribution (s. 9 (7)), and any sum deducted by an employer from wages or other remuneration in respect of a contribution is to be deemed to be entrusted to the employer for the purpose of paying the contribution (s. 9 (8)). Accordingly, if an employer makes such deductions and fails to pay the contributions he may be treated as guilty of embezzlement. In the case of outworkers, the regulations may provide for the contributions being determined by the amount of work done instead of by the weeks in which it is done (s. 9 (9)). Part IV. of the Collection of Contributions Regulations, 1924, makes provision for this being done on notice being given to the Department.

SUBSECTION (2).—*Preference in Bankruptcy.*

401. In the case of the bankruptcy of an employer or, where the employer is a company, the liquidation of the company, unpaid contributions are given a certain priority. Contributions unpaid for twelve months prior to the sequestration or the winding up have priority.[1]

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[1] Sec. 9 (5), and Article 32 of the Collection of Contributions Regulations, 1924.

[2] Sec. 9 (6), and Part VI. of the Collection of Contributions Regulations, 1924.

Subsection (3).—*Provisions as to Stamps.*

402. By regulations[2] made under s. 8 (2) the Postmaster-General has applied to National Health Insurance stamps provisions (including penal provisions) of the Stamp Duties Management Act, 1891,[3] and s. 65 of the Post Office Act, 1908.[4] This enables cases of fraudulent removal and affixing of stamps to be dealt with as a criminal offence. The Collection of Contributions Regulations made under s. 8 also forbid the affixing to contribution cards of stamps which have been cancelled or defaced or previously affixed to a card (Article 14 (2)).

Subsection (4).—*Inspectors.*

403. Sec. 92 of the Act empowers any inspector appointed by the Department for the purposes of the Act "to enter at all reasonable times any premises or place other than a private dwelling-house not being a workshop where he has reasonable grounds for supposing that any employed contributors are employed." Such inspectors have power to examine business books, etc., and also all persons found on the premises, but no one is required to answer any question or give any evidence tending to incriminate himself. A penalty of £5 is imposed for obstruction.

Subsection (5).—*Offences.*

404. Any employer who fails to pay contributions which he is liable to pay, or who deducts or attempts to deduct from the remuneration of an employed person the whole or any part of the employer's contribution, and any employer, insured person, or other person who is guilty of any contravention or non-compliance with any of the requirements of the Act or regulations thereunder for which no special penalty is provided, is liable on summary conviction to a fine of £10, and in the case of the failure of an employer to pay contributions the Court may on conviction order the respondent to pay to the Department a sum equal to the unpaid contributions (s. 96 (2)).[5] When the employer, being a company, fails to pay the unpaid contributions under such an order they may be recovered from the directors who knew, or who could reasonably be expected to have known, of the failure or neglect to pay the contributions.[6] Contributions may also be recovered by the Department by means of civil proceedings (s. 114 (2)). Sec. 97 (2) provides a further method of recovering unpaid contributions, but it has not been found necessary in Scotland to make use of this method.

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[1] Sec. 118 (1) (*e*) of Bankruptcy (Scotland) Act, 1913, and s. 106 of the National Health Insurance Act, 1924, as amended by s. 19 of the National Health Insurance Act, 1928.

[2] National Health Insurance (Stamps) Regulations, 1924, S.R. & O., 1924, No. 1541.

[3] 54 & 55 Vict. c. 38.

[4] 8 Edw. VII. c. 48.

[5] *Rintoul* v. *Scottish Insurance Commrs.*, 1913 S.C. (J.) 120, per Lord Justice-Clerk Macdonald at p. 125; *Paterson* v. *Scottish Insurance Commrs.*, 1917 S.C. 353.

[6] Act of 1928, s. 18.

405. An important lever to secure payment of contributions by employers is that provided by s. 98, whereby, if an employed person loses benefit by reason of the failure of his employer to pay contributions or otherwise to comply with the requirements of regulations relating to the payment and collection of contributions, the employed person may recover from the employer a sum equal to the amount of benefit lost or the expenses incurred by reason of his not being entitled to medical benefit. The employed person is given the same rights of recovery whether or not he is a member of a society.

406. Any person who buys, sells, or offers for sale, takes or gives in exchange, or pawns or takes in pawn any insurance card, insurance book, or used insurance stamp, is liable on summary conviction to a fine of £20 or to imprisonment for three months, or to both fine and imprisonment. For this purpose a used insurance stamp is one that has been cancelled or defaced though it may not have been used for the payment of a contribution (s. 96 (3)).

407. Sec. 97 extends the time for instituting criminal proceedings under the Summary Jurisdiction Act, 1908, in respect of offences under the Insurance Act. It allows proceedings to be taken for any such offence either within one year from the date of the commission of the alleged offence, or within three months from the date on which evidence sufficient, in the opinion of the Department, to justify a prosecution comes to their knowledge, whichever is the longer. For this purpose a certificate of the Department as to the date is to be conclusive. Proceedings for a contravention of or non-compliance with the Act or regulations thereunder may be instituted by the Procurator-Fiscal or by the Department (s. 114 (1)), or by an inspector or other officer authorised by the Department (s. 97 (3)).

408. In any summary proceedings under the Act, whether for an offence or for the recovery of contributions, the decision of the Department on any question of employment is to be conclusive unless an appeal against that decision is pending, and if a decision has not been obtained and a decision on the question is necessary for the purposes of the proceedings, the question is to be referred to the Department for decision (s. 97 (4)).

Section 4.—Benefits.

Subsection (1).—*General.*

409. The benefits conferred by the Act, which are declared to be inalienable (s. 21), are divided into two classes—(1) ordinary benefits, which are available to all contributors, and (2) additional benefits, which are available only to contributors who are members of approved societies which on valuation have a surplus out of which such benefits may be provided. The ordinary benefits are four in number—(1) medical benefit; (2) sickness benefit; (3) disablement benefit; and (4) maternity benefit. Of these, sickness and disablement benefits cease at 65 (s. 13 (8)). The other benefits continue through life. Medical benefit is administered by Insurance Committees,[1] while the remaining ordinary benefits are administered, in the case of members of approved societies, by the societies, and, in the case of deposit contributors, by Insurance Committees and the Department.[2]

SUBSECTION (2).—*Medical Benefit.*

(i) *Scope of and Title to Benefit.*

410. Medical benefit consists of free medical attendance and treatment, including the provision of proper and sufficient medicines and such chemical reagents as well as such medical and surgical appliances as may be prescribed by regulations made by the Department, but it does not include treatment in respect of a confinement (s. 10 (2)). The provision of medical benefit is governed by regulations made under s. 24, which are entitled the National Health Insurance (Medical Benefit) Consolidated Regulations, 1929.[3] In accordance with these regulations the service comprises "all proper and necessary medical services, other than those involving the application of special skill and experience of a degree or kind which general practitioners as a class cannot reasonably be expected to possess." [4] It does not include dentistry or a surgical operation unless it is of a minor character such as a general practitioner would perform.

411. Medical benefit is available to every insured person from the moment he enters into insurance. There is no qualifying period or qualifying number of contributions required as in the case of other benefits. It continues so long as he remains in insurance, and is in no way affected by arrears of contributions (s. 15 (1) (*a*)). There is, however, one exception, and that is the voluntary contributor whose total income from all sources exceeds £250. He is not entitled to medical benefit (s. 12 (3)). Exempt persons, although they do not themselves pay contributions, are entitled to medical benefit as a return for the contributions paid by their employers in respect of them, and what has been said above with regard to insured persons applies equally to exempt persons. An exempt person whose total income from all sources exceeds £250 is, however, required to make his own arrangements for medical benefit, although he is not deprived of the benefit altogether (s. 12 (5)).[5]

(ii) *Administration.*

412. Sec. 24 and the regulations thereunder are designed to secure as far as possible a free choice of doctor and patient and the separation of medical treatment from the supply of medicines. In each Insurance Committee area (*i.e.* every burgh having a population of 20,000 and upwards at the Census of 1911, and every county) a list or panel of doctors has to be drawn up, consisting of those doctors who have intimated their willingness to attend insured persons in accordance with the Act and regulations. Every duly qualified medical practitioner has the right to be included in the list, except where he has been removed by the Department or the Minister of Health from a list, following an inquiry into his conduct (s. 24 (6)). Insured persons have free choice of doctor from amongst those on the list, while a doctor also has the right to refuse to attend a particular insured person, so however that medical treatment must always be provided to every insured person within the area (s. 24 (2)). Provision is made by the regulations for an insured person changing his medical practitioner at any time where both the doctor and the patient consent, or, after giving fourteen days' notice to the Insurance Committee, without any such consent, subject to compliance with the procedure laid down in the regulations (Article 16 (1)). The Department may, as a result of an inquiry, which in terms of Part VI. of the regulations is held by a committee, consisting of an advocate or law agent and two doctors, remove any doctor from the list if it is of opinion that his continuance thereon would be prejudicial to the efficiency of the service (s. 24 (2), prov. (i)). From the decision of the Department there is no appeal.

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[1] See Insurance Committees, para. 481 *et seq.*, *infra.*

[2] See Deposit Contributors, para. 448 *et seq.*, *infra.*

[3] S.R. & O., 1929, No. $\frac{202}{\text{S. 9}}$.

[4] Regulations, Schedule I., Part I., para. 8 (1).

[5] See para. 416, *infra.*

413. The position with regard to drugs is substantially similar. A list or panel is drawn up, and it is open to any chemist or other person (not being a person already removed from a list—s. 24 (6)) to be included, but the Department, if satisfied after an inquiry held under Part VII. of the regulations, may prevent any person being so included, if his inclusion would be prejudicial to the efficiency of the service (s. 24 (5) (*b*)). Unless in exceptional cases, such as in outlying rural areas, it is not permissible for a doctor to provide drugs except those which he administers personally (s. 24 (5), prov. (ii)).

414. The regulations require each insurance practitioner to issue free of charge, in cases of incapacity for work, medical certificates to enable the insured person to claim sickness or disablement benefit, and also to issue certificates for the purposes of certain additional benefits (s. 24 (7) (*a*)).

(iii) *Complaints and Disputes.*

415. The regulations contain elaborate machinery for dealing with complaints by insured persons or their approved societies against doctors or chemists, and complaints by doctors against their patients,[1] as well as with cases of excessive prescribing by doctors. Excessive prescribing is defined in Article 41 as that, by reason of the character or quantity of the drugs or appliances ordered or supplied by a practitioner, the cost is in excess of what may reasonably be necessary for the adequate treatment of insured persons on his list. It is the duty of the Panel Committee, which is a committee representing the doctors on the Insurance Committee's list set up under s. 52, to investigate all cases of excessive prescribing. In a dispute under the regulations, any aggrieved party may appeal to the Department, and the regulations provide, where a hearing is required, for the case being referred for decision to a special body appointed as therein specified. The regulations authorise the Department to make a deduction, through the appropriate Insurance Committee, from the remuneration of any doctor or chemist who fails to comply with his terms of service (Article 40).

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[1] See Insurance Committees, para. 484, *infra*.

(iv) *Miscellaneous.*

416. The regulations must in terms of s. 24 (2) (*e*) permit members of any friendly or other society which, or a separate section of which, became approved, who were members on 16th December 1911, and are not entitled to medical benefit by reason of their being subject to permanent disablement on 15th July 1912, to get medical treatment on the same terms as insured persons. Sec. 24 (3) requires that the regulations should authorise Insurance Committees to fix an income limit and to require any person whose income exceeds that limit, in lieu of receiving medical benefit under the ordinary arrangements, to make his own arrangements for receiving medical treatment. In fact, no such income limit is in operation. The regulations, however, in accordance with s. 24 (3), also authorise Insurance Committees to allow any person to make his own arrangements for obtaining medical treatment. Where own arrangements are allowed, the Insurance Committee have to contribute towards the expenses incurred by the insured person in making these arrangements. The Act also contemplated that persons might be allowed to obtain treatment through institutions providing medical treatment at the passing of the Act of 1911 (s. 24 (4)), but there are now no such approved institutions in Scotland.

417. To meet cases where there is not an adequate medical service in any area or part of an area, or the service is not satisfactory, the Act empowers the Department to authorise the making of other arrangements, or to suspend the right to medical benefit and pay each insured person a sum in respect of the cost of medical attendance and treatment, or alternatively to require insured persons to make their own arrangements (s. 24 (2), provs. (ii) and (iii), and s. 24 (5), prov. (i)), but it has not been found necessary to take advantage of these powers. Further, s. 112 (5) contains a special provision applicable to Scotland whereby an Insurance Committee may, with the consent of the Department, modify or suspend any of the benefits for the administration of which it is responsible (*e.g.* medical benefit), where owing to sparseness of population, difficulties of communication, or other special circumstances they consider it desirable, but in this case also it has not been found necessary to make any use of the provision.

418. The right to medical benefit is not suspended by reason of misconduct, as may be the case with sickness or disablement benefit (s. 12 (7)). The benefit is also regulated by rules for its administration which every Insurance Committee is required to make, subject to the approval of the Department (s. 23).

SUBSECTION (3).—*Sickness Benefit.*

(i) *Definition, Rate, and Title.*

419. Sickness benefit, which in the case of approved society members is administered by approved societies, consists of periodical payments whilst the insured person is rendered incapable of work by some specific disease or by bodily or mental disablement of which notice has been given, commencing on the fourth day of incapacity and continuing for a period not exceeding 26 weeks (s. 10 (1) (*b*)). Disablement benefit is the benefit payable after the termination of sickness benefit while incapacity continues. The ordinary rate of sickness benefit is 15s. a week in the case of men and 12s. a week in the case of women, but, until 104 weeks have elapsed since the entry of the insured person into insurance and 104 weekly contributions have been paid by or in respect of him, the rate is reduced to 9s. in the case of a man and 7s. 6d. in the case of a woman (s. 13 (2)). As regards the amount of benefit for odd days, the matter is regulated by the rules of the appropriate society made under s. 22 (1). In most cases one-sixth is payable for each day except Sunday. No insured person is entitled to sickness benefit until 26 weeks have elapsed since his entry into insurance, and at least 26 weekly contributions have been paid by or in respect of him (s. 13 (3)). Sickness benefit as well as disablement benefit ceases to be payable on the insured attaining the age of 65 (s. 13 (8)).

(ii) *Incapacity for Work.*

420. It is important to observe that sickness benefit is not payable in respect of partial incapacity for work but only of total incapacity. The interpretation of "incapable of work" is difficult and important. The generally accepted view does not require that there should be total inability to carry out any of the physical or mental processes that constitute work. An insured person would be regarded as incapable of work if he were unable, for the time being, to follow his ordinary occupation, even though he might be fit for some other less exacting form of work, provided that it appears probable that he will soon be able to resume his former work. So also would an insured person be regarded as incapable of work if he was in such a condition through some specific disease or bodily or mental disablement that an attempt to work would be seriously prejudicial to his health. On the other hand, if, at the commencement of the illness, or at some later stage, the insured person appears unlikely to be again fit for his ordinary work, he should not, it is thought, be regarded as incapable of work if and when his physical condition is such that he is capable of performing remunerative work of some kind or other which in all the circumstances it would not be unreasonable to expect him to undertake. It is submitted that in considering a claim for sickness or disablement benefit no distinction can properly be drawn between incapacity due to pregnancy and incapacity due to an illness or accident or other such cause.

(iii) *Linking up of Illnesses.*

421. Sec. 13 (5) provides that, where a person falls ill within one year after recovering from an illness for which he has been in receipt of sickness benefit, the second illness is deemed to be a continuation of the first illness for the purpose of calculating the 26 weeks during which sickness benefit is payable. Accordingly if a contributor took ill in January and was ill for 20 weeks and 3 days, receiving 20 weeks' sickness benefit, and then fell ill again in September, his second illness (even though it had no connection with the previous illness) would be deemed to be a continuation of it, with the result that benefit would be payable from the first and not the fourth day of incapacity, but if the illness lasted say for 10 weeks he would be entitled only to 6 weeks' sickness benefit. At the end of the six weeks he would, if qualified, be entitled to disablement benefit. If he again fell ill in the February following he would not be entitled to any sickness benefit, but only, if qualified, to disablement benefit from the first day. If, however, having recovered from the second illness in November, his next illness did not begin till say December of the following year, he would be entitled to sickness benefit as for a new illness. For the purposes of s. 13 (5), "recovery" means, it is thought, only a cessation of total incapacity and not the entire absence of any trace of the disease or disablement producing the incapacity.

(iv) *Notification of Illness, etc.*

422. If an insured person fails without reasonable excuse to notify his society of his incapacity on or before the third day of incapacity, benefit only commences to be payable as if the date on which notice is given were the third day of incapacity, and any benefit that might have been claimed otherwise is forfeited. Provision is made to meet cases where the insured had originally a good excuse for not giving notice but had no excuse for subsequent delay (s. 13 (4)). This provision applies to disablement benefit as well as sickness benefit. Every society must have a rule in the prescribed form relating to the behaviour of the member during sickness (s. 22 (1) (*d*)). The rule is set out in the National Health Insurance (Approved Societies) Regulations, 1930, Schedule XIII. These regulations are hereinafter referred to as the Approved Societies Regulations.

SUBSECTION (4).—*Disablement Benefit.*

423. Disablement benefit, which is also administered by approved societies for their members, is the complement of sickness benefit, and begins when sickness benefit ends and continues while the insured person remains incapable of work (s. 10 (1) (*c*)). Like sickness benefit, it is not payable in case of partial incapacity. The ordinary rate of disablement benefit is 7s. 6d. per week for both men and women. No insured person is entitled to disablement benefit until 104 weeks have elapsed since his entry into insurance, and at least 104 weekly contributions have been paid by or in respect of him (s. 13 (3) (*b*)). In order to qualify for disablement benefit or for the full rate of sickness benefit, s. 7 (4) allows any employed contributor who has not had 104 weekly contributions paid in respect of him to pay contributions for weeks of incapacity or weeks of inability to obtain employment, but the necessary 104 weeks must have elapsed since his entry into insurance before disablement benefit or the full rate of sickness benefit becomes payable.

SUBSECTION (5).—*Limitations of Right to Sickness and Disablement Benefits.*

424. There are certain important provisions of the Act which materially limit or modify the right to sickness and disablement benefits. One or two apply to maternity benefit also.

(i) *Relation of Maternity Benefit to Sickness or Disablement Benefit.*

425. Under s. 13 (7) a married woman, or a widow confined of a posthumous child, is not entitled to sickness or disablement benefit for a period of four weeks after her confinement, and no other woman is entitled to sickness or disablement benefit for that period unless her disease or disablement is not connected directly or indirectly with her confinement. This provision is occasioned by the fact that maternity benefit will be payable at that time.

(ii) *Arrears.*

426. The next and most important of all the limitations is the provision with respect to arrears contained in s. 15 of the Act and in the regulations thereunder—the National Health Insurance (Arrears) Regulations, 1930.[1] The scheme of s. 15 and of the Arrears Regulations is that an employed contributor is not to be regarded as in arrear for any period during which he was incapable of work by reason of a notified disease or disablement, or for any period as respects which he proves within a limited time that he was available for but unable to obtain employment within the meaning of the Act (s. 15 (3) and (4)). Arrears are also excused for any period during which the insured person was in receipt of a war pension in respect of the highest degree of disablement, and in consequence thereof is subject to a reduction of sickness or disablement benefit (s. 60 (3)). For the purposes of calculating arrears, contributions are treated as paid during the periods mentioned. In practice, therefore, arrears accrue only in respect of periods when the employed contributor voluntarily abstains from work. In the case of the voluntary contributor contributions are treated as paid in respect of periods of incapacity due to a notified disease or disablement, and also periods while a full disability war pension is payable, but, as his status is not that of an employed person, he is not excused contributions in respect of any period with respect to which he might be able to prove that he was available for but unable to obtain employment. Sec. 15 (1) (*a*) authorises a distinction to be drawn between employed contributors and voluntary contributors as regards the effect of arrears and the amount to be paid in order to cancel arrears, but as employed contributors are now, as a result of the Act of 1928, excused arrears for periods of genuine unemployment, no such distinction is drawn.

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[1] S.R. & O., 1930, No. 187.

427. Under the Arrears Regulations, if 50 or more contributions are paid or treated as paid in a contribution year, there is no reduction on account of arrears. Where the contributions paid and treated as paid amount to between 49 and 36, the regulations prescribe a gradually reducing rate of sickness or disablement benefit according to the amount of arrears. Where the contributions paid and treated as paid amount to less than 36, sickness and disablement benefits are suspended, and if they amount to less than 26, maternity benefit is also suspended. Provision is made by the regulations for the insured person paying up his arrears to qualify for a higher rate of benefit at any time within the period of grace, *i.e.* normally the period between the end of the contribution year and the end of November, the sum payable being, except in the case of elderly contributors, the same as the weekly contribution. The arrears scheme depends upon the contributions paid or treated as paid for each contribution year, which is approximately from the beginning of July in the one year to the end of June in the following year. These contributions govern the benefits payable during the calendar year beginning immediately after the end of the contribution year, and no account is taken of contributions paid in any previous year. Special provisions are made for elderly contributors, *i.e.* persons who on attaining the age of 60 in the case of men or 55 in the case of women had been continuously insured for a period of ten years or since 15th July 1912, whichever is the shorter. The concession takes the form of treating one contribution paid by way of cancelling arrears as liquidating two contributions, so far as the contributions paid are in excess of the number required, together with contributions paid or excused, to make up 26.

(iii) *Persons entitled to Workmen's Compensation, etc.*

428. Another important limitation is contained in s. 16, which provides that "where an insured person has received or recovered, or is entitled to receive or recover, whether from his employer or any other person, any compensation or damages under the Workmen's Compensation Act, 1906, as amended by any subsequent enactment, or under any scheme certified thereunder, or under the Employers' Liability Act, 1880, or at common law in respect of any injury or disease," no sickness or disablement benefit shall be paid to the insured person in respect of that injury or disease where the weekly sum or the weekly value of the lump sum paid or payable is equal to or greater than the benefit. Where it is less than the benefit, a sum equal to the difference between the benefit and the weekly sum or weekly value is payable. No account is taken of compensation or damages which are irrecoverable, as, *e.g.*, by reason of bankruptcy. The weekly value of a lump sum falls to be determined by the society, subject to the provision of the Act relating to disputes and appeals.

429. The section does not leave the insured person the right to elect whether to claim sickness benefit or to claim compensation or damages. It forces him to claim the latter, and "if he unreasonably refuses or neglects to take proceedings to enforce his claim" the society may withhold benefit or may themselves at their own expense take proceedings in name of the insured; but, if they do, they have to hold the sum recovered for him (s. 16 (3)). A society may, pending the settlement of a claim, make a payment to the member of benefit by way of advance (s. 16 (4)), and machinery is provided whereby, on giving notice to the employer or other person liable in the compensation or damages, they may recover out of the compensation or damages the sum so advanced (s. 16 (5)). Where a person makes a payment in answer to a claim for compensation or damages without admitting liability, the payment is treated, for the purposes of this provision, as if it were a payment of compensation or damages.[1] If the society do not recover the money in this way, they may recover it from the insured person by deduction from or suspension of benefits subsequently payable (s. 16 (4)). It will be observed that the section relates not merely to workmen's compensation or other claims against an employer, but also to claims at common law for injuries in the street or otherwise. Accordingly the section may operate in the case of a voluntary contributor as well as in the case of an employed contributor.

430. The exclusion of sickness or disablement benefit applies only to the benefit in respect of the injury or disease for which the compensation or damages are payable, so that if a person, while incapable by reason of an existing disease or disablement, sustains an accident in the street for which damages are recoverable, these damages will not affect the claim for sickness benefit while he remains incapable owing to the prior disease or disablement. When, however, that disease or disablement disappears, at least to such an extent as to cease to render him incapable of work, then, if he is still incapable of work but the cause thereof is the injury for which damages are payable, he will be subject to the provisions of the section. Again, where a person is rendered incapable of work by an injury for which compensation or damages are payable, then, while that injury or disease continues to involve total incapacity, it is thought that sickness benefit would not be payable on account of any supervening sickness, seeing that the insured person would not be "rendered" incapable of work by that sickness; but so soon as the accident ceased to produce total incapacity, then if he still remained incapable of work, but it was attributable to the sickness, benefit would become payable. Sec. 16 (6) applies the section to certain pensions, grants, or allowances payable under the Injuries in War (Compensation) Act, 1914,[1] and other Acts.

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[1] Act of 1928, Schedule II.

(iv) *Inmates of Poorhouses, etc.*

431. A further important limitation on the payment of sickness and disablement benefits is contained in s. 17, which relates to the benefits of persons who are inmates of " any workhouse, hospital, asylum, convalescent home, or infirmary supported by any public authority or out of any public funds or by a charity or voluntary subscriptions." No payment on account of sickness or disablement benefit is to be made in respect of any insured person while he is an inmate of such an institution, nor is any payment to be made on account of maternity benefit while the woman is an inmate of such an institution (subs. (1)). The sum which would have been payable on account of the benefit, if the person has dependants, is, after consultation where possible with him, payable in whole or in part, at the discretion of the society, for the advantage of those dependants in such proportions as the society determine; and, so far as not required, or, if he has no dependants, and if in any case he so authorises, it may, at the discretion of the society, be applied towards defraying any expenses incurred by him otherwise than to the institution, and so far as not so applied it may be paid to the institution, provided it is not a poorhouse, asylum, or other similar institution maintained out of public funds. Sec. 132 (1) defines "dependants" as including persons ascertained to be wholly or in part dependent on the person's earnings. If the inmate is a married woman or a widow, and the sum represents two maternity benefits, one of the maternity benefits is not to be applied for behoof of the dependants, but may be paid to the institution as if she had no dependants. A poor law institution is not entitled to refuse a person admission on the ground of his right to any benefit (subs. (2)).

432. As regards any sum which has accrued while the person was in the institution, but has not been dealt with as above mentioned, the person, when he leaves the institution, is entitled to it, either in a lump sum or by way of weekly instalments, each instalment not being less than 10s. nor more than £2 unless in special circumstances, except where the money represents a maternity benefit, in which case it has to be paid in a lump sum. If the person dies in the institution, the sum otherwise payable is treated as forming part of his estate. In no case, however, is more than £50 payable, any excess passing to the Central Fund for the benefit of societies in general (subs. (3)). In this connection reference may be made to s. 28 and the regulations thereunder,[1] whereby insured persons may execute nominations dealing with sums payable by way of benefit at death, including sums under s. 17. Where there is intestacy and no nomination, the society may distribute the money amongst the persons who appear to them to be entitled to it, without the necessity of confirmation.

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[1] 4 & 5 Geo. V. c. 30.

(v) *Ex-Service Men entitled to Full Disability War Pension.*

433. A limitation which is important in connection with ex-service men is that contained in s. 60, whereby an insured person in receipt of a pension on account of disablement in the highest degree in consequence of the late war has his sickness or disablement benefit reduced by 7s. 6d. a week. On his proving that since leaving the service he has been insurably employed or engaged in some regular occupation for 26 weeks and 26 contributions have been paid in respect of him, the limitation ceases to operate as regards sickness benefit, and similarly on his proving insurable employment or being engaged in a regular occupation for 104 weeks and 104 contributions having been paid in respect of him, he is entitled to full disablement benefit. The employment or occupation must be such as to provide a substantial contribution towards his means of livelihood (subs. (1)).

(vi) *Schemes Varying Benefits.*

434. Another limitation which, however, is of no importance, since practically no use has been made of the power, is that contained in s. 18, whereby a society may submit to the Department a scheme for substituting any of the additional benefits for sickness and disablement benefit or any part thereof, and, if the scheme is approved, provide benefits in accordance therewith.

SUBSECTION (6).—*Maternity Benefit.*

435. Maternity benefit consists of a payment of 40s. in the case of the confinement of the wife or, where the child is a posthumous child, of the widow of an insured person, or of any other woman who is an insured person (s. 10 (1) (*d*), and s. 14 (1)). The benefit is administered in cash or otherwise as the society considers proper. Confinement is not defined in the Act, but in the rules of every society it is defined as "labour resulting in the issue of a living child or labour after 28 weeks of pregnancy resulting in the issue of a child whether alive or dead." No maternity benefit is payable unless 42 weeks have elapsed since the insured person's entry into insurance and 42 contributions have been paid in respect of him (s. 14 (3)). If the husband only is insured, a single maternity benefit is payable from his insurance. If both the husband and the wife are insured, then two maternity benefits are payable, one from the husband's insurance and the other from the wife's (s. 14 (4)). If for any reason the benefit is not payable from the husband's insurance, *e.g.* on account of arrears, both benefits are payable from the wife's insurance. If the husband is a deposit contributor, and by reason of insufficiency of the amount at his credit a maternity benefit of less than 40s. is payable from his insurance, the wife's society pays the amount of the deficiency in addition to the separate maternity benefit from her insurance (s. 14 (5)). If the wife alone is insured, then where she is not a woman subject to the special provisions of s. 56 (1), two maternity benefits are payable (s. 14 (4)); but where she is a woman subject to these special provisions, only one maternity benefit is payable. In the case of an unmarried woman only one maternity benefit is payable from her insurance. As was mentioned in connection with arrears, the right to maternity benefit is suspended where the contributions paid and treated as paid in respect of the insured person in a contribution year amount to less than 26, whether the insured is an employed or a voluntary contributor, but this does not apply to the maternity benefit payable to a married woman under s. 56 (1).

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[1] The Approved Societies Regulations, 1930, Part XVI.

436. Maternity benefit is in every case the mother's benefit, and is to be administered in the interests of the mother and the child (s. 14 (6)). Her receipt is a sufficient discharge to the society, but she may authorise her husband to receive the benefit on her account (s. 14 (7)). A widow is entitled to maternity benefit from her late husband's insurance in respect of a posthumous child in the same way as if the husband were alive, but arrears do not accrue as regards the husband's insurance for any period after his death (s. 15 (3) (*b*)). A wife is entitled to maternity benefit from her husband's insurance, notwithstanding that her husband is not the father of the child. The right to the benefit accrues in respect of her status as the wife of an insured person.[1] Nos. (ii) and (iv) of the limitations as regards sickness and disablement benefits dealt with above [2] apply also as regards maternity benefit.

SUBSECTION (7).—*Additional Benefits.*

437. Insured persons who are members of approved societies may, if the society to which they belong discloses at its quinquennial valuation a surplus which is certified by the valuer to be disposable,[1] acquire a right to further benefits, which are called "additional benefits" (s. 10 (1) (*e*)). The additional benefit or benefits to which the members of a society are entitled are those selected by the society from the list—sixteen in number—set forth in the Third Schedule to the Act of 1924 as amended by the First Schedule to the Act of 1928. The schedule includes power to prescribe further additional benefits of a similar character. Additional benefits may be divided into three classes: (1) Increases of cash benefits and repayment of contributions (Nos. 1, 2, 3, and 7); (2) allowances during convalescence or infection or distress (Nos. 4, 5, and 6); and (3) payments in respect of treatment benefits and the provision and maintenance of convalescent homes (Nos. 8 to 16). The treatment benefits include dental benefit, ophthalmic benefit, treatment in hospitals or convalescent homes, nursing, the provision of medical and surgical appliances, and the provision of specialist treatment, but specialist treatment can be given only under a scheme specially approved by the Department, and no such scheme has yet been approved.

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[1] *Scott* v. *The Northumberland and Durham Miners' Permanent Relief Fund Friendly Society*, [1920] 1 K.B. 174.

[2] See paras. 426, 427 and 431, 432, *supra*.

438. The right to additional benefits emerges only after the lapse of a prescribed period since the member joined the society.[2] Additional benefits Nos. 1, 2, and 3 are subject to arrears, like the sickness, disablement, and maternity benefits to which they relate, but the other additional benefits are not, although it would be competent under the Act to make them so (s. 75 (2)).

439. The administration of additional benefits is governed by regulations under s. 75 (7). These regulations have not yet been made except as respects certain aspects of dental benefit.[3] They must give the insured person the free choice of obtaining treatment from any practitioner, clinic, or other institution with whom arrangements are made in accordance with the regulations (s. 75 (7)). A disposable surplus arising on valuation may be applied to a limited extent in paying subscriptions or donations of an eleemosynary character to hospitals, dispensaries, or other charitable institutions, or for the support of district nurses, or for the purposes of medical research to institutions approved by the Department (s. 75 (1B)), but may not be applied to any extent whatsoever in the provision of death benefits (s. 75 (3)). The regulations under s. 75 (7) may, if thought fit, provide for the administration of any of the additional benefits being placed under Insurance Committees, but presumably the administration of most, if not all, the benefits will be in the hands of societies.

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[1] See Approved Societies, para. 473, *infra.*

[2] Sec. 75 (4) and Article 10 of the National Health Insurance (Approved Societies) Amendment Regulations (No. 3), 1928, Provisional Rules and Orders, 1928.

[3] National Health Insurance (Dental Benefit) Regulations, 1929, S.R. & O., 1929, No. 112.

SUBSECTION (8).—*Miscellaneous Provisions as to Benefits.*

(i) *Rules for Administration of Benefits.*

440. Under s. 22 every society has, subject to the approval of the Department, to make rules with regard to the manner and time of paying or distributing and the mode of calculating benefits, suspension of benefits, notices and proof of sickness, behaviour during sickness, and the infliction and enforcement of penalties. The actual administration of benefits depends to a considerable extent upon the rules of the particular society of which the insured person is a member.

(ii) *Cost of Transmission.*

441. Except where special arrangements are made at the request of the insured, the society is not entitled to make any deduction from any cash benefit on account of the cost of transmission (s. 22 (3)).

(iii) *Benefits in case of Residence Abroad, and Reciprocal Arrangements with Irish Free State and Isle of Man.*

442. The general rule is that no person is entitled to any benefit while he is resident either temporarily or permanently outside the United Kingdom (*i.e.* England, Scotland, Wales, and Northern Ireland), but there are certain exceptions (s. 19 (1)). In the case of maternity benefit it does not matter where the insured husband is, benefit is payable if his wife is in the United Kingdom at the time of confinement. Persons temporarily resident in the Irish Free State, the Isle of Man, or the Channel Islands do not lose their rights to sickness, disablement, or maternity benefit for six months from the date on which they become temporarily resident there, or for a longer period if the society thinks fit (s. 19 (1) (*a*)). If a person has gone temporarily abroad elsewhere than to the Irish Free State, the Isle of Man, or the Channel Islands, the society may allow him to receive sickness or disablement benefit if his incapacity commenced prior to his going abroad (s. 19 (1) (*c*)). Provision is made in s. 19 (1) (*b*) for reciprocal arrangements being made with the Isle of Man or the Channel Islands, when they have a National Health Insurance Scheme, whereby persons going from the one country to the other may continue to receive their insurance benefits and have their insurances treated as continuous. Sec. 20 makes similar but more elaborate provisions for arrangements with the Irish Free State, which has a National Health Insurance Scheme. Arrangements have been made with the Irish Free State and the Isle of Man.[1]

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[1] See the National Health Insurance (Irish Free State Reciprocal Arrangements) Order, 1924, S.R. & O., 1924, No. 208; and the National Health Insurance (Isle of Man Reciprocal Arrangements) Regulations, 1924, S.R. & O., 1924, No. 1506.

(iv) *Persons of Unsound Mind.*

443. In accordance with regulations made under s. 104 (Article 233 of the Approved Societies Regulations), an approved society may appoint a person to receive the benefit or otherwise act on behalf of an insured person who is of unsound mind. Of course the person appointed must apply the money for the benefit of the lunatic.

(v) *Improper Payments of Benefits.*

444. Where a person has been in receipt of benefit to which he is not entitled the Department may recover the overpayment from him or his legal representatives, and any sum so recovered is repayable to his society (s. 27 (1)). This right of recovery vested in the Department does not, however, affect the right on the part of the society to recover at their own hand any overpayment of benefit. They may recover any overpayment by deductions from sickness or disablement benefit within four years from the date on which the improper payment was made, but the amount deducted is not to exceed one-fourth of the benefit payable at the time (s. 27 (1A)). Under regulations made under s. 27 (2) (Articles 43 and 44 of the Approved Societies Regulations), certain overpayments not recovered may be charged to the Benefit Fund Account of the society while other overpayments are chargeable to the society's Administration Account.

(vi) *Offences.*

445. If, for the purpose of obtaining any benefit or the crediting of a reserve value, either for himself or for any other persons, any person knowingly makes any false statement, he is liable on summary conviction to three months' imprisonment with or without hard labour (s. 96 (1)). As mentioned in dealing with failure to pay contributions, s. 97 (1) extends the time within which summary prosecutions may be instituted for offences under the Act.

(vii) *Sanatorium Benefit repealed.*

446. This benefit was one of the benefits originally provided by the National Insurance Act, 1911. It was defined as "treatment in sanatoria or other institutions or otherwise when suffering from tuberculosis or such other diseases as the Local Government Board for Scotland, with the approval of the Treasury, may appoint." The right to the benefit depended upon the recommendation of the Insurance Committee, who were charged with its administration. The Act did not authorise Insurance Committees to provide institutions, but merely to make arrangements with local authorities and other bodies in charge of institutions. The National Health Insurance Act, 1920, repealed sanatorium benefit as one of the benefits except as regards Ireland. Under the Public Health (Scotland) Act, 1897, local authorities have power to treat tuberculosis, which is regarded as an infectious disease.

SECTION 5.—SPECIAL CLASSES OF INSURED PERSONS.

447. Certain classes of insured persons are subject to special provisions, under which their benefits, and in some cases also their contributions, differ from those generally in force. These are (1) deposit contributors, (2) married women, (3) soldiers and other members of the forces of the Crown, and (4) persons employed in the mercantile marine. Aliens are treated like British subjects, but power is reserved in s. 109 to prescribe otherwise by regulations. This power has not been exercised.

SUBSECTION (1).—*Deposit Contributors.*

(i) *General.*

448. In order to secure the benefits provided by the Act, every insured person must become a member of an approved society, but the Act had to make provision for the case of persons who fail to join a society, either because of the state of their health or, as has been found to be more common, because of indifference. A deposit contributor is defined in s. 54 (1) as "an insured person who has not joined an approved society within the prescribed time, or who, having been a member of an approved society, has been expelled therefrom or has terminated his membership thereof in accordance with the provisions of the Act, and has not within the prescribed time joined another society." The prescribed time is provided for in Article 7 of the Approved Societies Regulations.

449. Apart from those deposit contributors who are able to prove that the state of their health is such that they cannot obtain admission to an approved society, and for whom special provision was made, as hereinafter mentioned, by the National Health Insurance Act, 1928, the position of a deposit contributor is that his contributions, without any deductions in respect of reserve value or otherwise, are credited to an individual account in his name in the Deposit Contributors' Fund (s. 54 (1)). The first charge upon the sum at his credit in that account is the amount required to provide him with medical benefit and to meet the expenses of administration, less the State proportion. As in the case of members of societies, the State contributes one-seventh in the case of men and one-fifth in the case of women towards the cost of benefits and the administration thereof. Any balance at the credit of the deposit contributor in the fund is available to meet claims for sickness, disablement, and maternity benefits. If there is no money left in his account to meet the cost of a benefit, then the benefit is not provided.

450. The keeping of the accounts in the fund and the general administration of the accounts are governed by regulations made under s. 54 (2).[1]

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[1] The National Health Insurance (Deposit Contributors) Regulations, 1927, S.R. & O., 1927, No. 1293; and the National Health Insurance (Deposit Contributors) Amendment Regulations, 1930, S.R. & O., 1930, No. 198.

To facilitate administration, the accounts of deposit contributors are, in accordance with the regulations, kept in terms of contributions, *i.e.* on the basis of a unit representing a contribution, and the rate of the benefit payable is a multiple of contribution units plus the State grant. Thus the ordinary weekly rate of benefit is 14s. 11d. instead of 15s. in the case of a man, and 11s. 5d. instead of 12s. in the case of a woman. The fund and all the accounts in the fund, as well as the payment of benefits, are under the charge of the Department, while the Insurance Committee perform certain duties in connection with claims for benefit. The various provisions of the Act contemplate that Insurance Committees have the administration of the benefits of deposit contributors, but this is true only to a limited extent.

451. Subject to these general observations, the position of the deposit contributor is substantially the same as that of the member of an approved society. He is an insured person, and the general provisions of the Act apply to him. The Deposit Contributors Regulations, in terms of s. 54 (2) (*a*), provide for the application to deposit contributors, subject to the necessary modifications, of a number of the provisions of the Acts relating to members of approved societies, such as the provisions of s. 3 as to the period of free insurance on a person ceasing to be employed. It is open to a deposit contributor at any time to become a member of a society, and thereupon, under s. 55 (2), the sum at his credit in the fund is carried to the Reserve Suspense Fund, and there is charged to that fund and credited to the society a transfer value representing the liability of the society to provide benefits to the insured (s. 43 (2)). Where a member of a society leaves his society and becomes a deposit contributor there is credited to his account in the Deposit Contributors Fund a sum representing the value of his contributions, regard being had to his age and the period of his insurance, and the amount by which his transfer value exceeds the sum so carried to his credit is carried to the Reserve Suspense Fund, the portion representing the outstanding reserve value being cancelled (s. 55 (1)).

(ii) *Deposit Contributors Insurance Section.*

452. To meet the case of insured persons who are deposit contributors solely by reason of the state of their health, s. 11 of the Act of 1928, by way of amending s. 54 of the Act of 1924, set up a fund within the Deposit Contributors Fund called the Deposit Contributors Insurance Section, for the purpose of providing those contributors with the same benefits as if they were members of societies, and not making those benefits dependent on the state of the individual contributor's account in the fund. A deposit contributor "who makes application to the Department in the prescribed manner and within the prescribed time. and proves that the state of his health is such that he cannot obtain admission to an approved society, and in whose case the prescribed conditions are fulfilled," is entitled to be admitted a member of the section. The National Health Insurance (Deposit Contributors Insurance Section) Regulations, 1929,[1] prescribe the various matters as required by the Act.

453. The Insurance Section is regarded as an approved society, and the members are entitled to the ordinary benefits but not to additional benefits (s. 54 (3) (*b*)). Upon a deposit contributor becoming a member of the section, a transfer value is credited to the section as in the case of an insured person joining a society. As the section consists of insured persons whose lives are a bad proposition from the insurance point of view, without further assistance a deficiency would certainly be found on the valuation of the section. Accordingly s. 54 (3) (*d*) provides that in addition to the contributions of the members of the section, from which contributions the usual deductions for reserve values, etc., are made, the section is to be credited with the amounts standing to the credit of deposit contributors who die or who permanently cease to reside in the United Kingdom, and with the interest earned by the Deposit Contributors Fund after 1927. The administration of the benefits of the members, which is governed by the Deposit Contributors Insurance Section Regulations, is mainly in the hands of the Department. Provision is made for a valuation of the assets and liabilities of the section (s. 54 (3) (*f*)). Members may not remain in the section longer than necessary, and s. 54 (3) (*g*) gives power to the Department to terminate membership, on giving notice to the insured person, where the state of his health is no longer such as to disqualify him for admission to a society.

SUBSECTION (2).—*Married Women.*

454. Special provisions are made by s. 56 in the case of women who on or about the time of marriage cease to be employed, whereby instead of being entitled to the ordinary rights of insured persons throughout the free period of insurance after ceasing to be employed they are given certain restricted benefits. Sec. 56 (1), so far as defining the women in question, is in the following terms: "Where a woman, being an insured person and a member of an approved society, marries she shall, if she had before the date of her marriage ceased, or if at any time while married and within twelve months after the date of her marriage she ceases, to be a person whose normal occupation is employment, cease as from the date of her marriage or from the date when she ceased to be such a person, whichever is the later, to be entitled to the benefits to which she would otherwise have been entitled under the provisions of the Act." She is then entitled only to the special benefits. A woman ceases to have a normal occupation of employment as soon as she has been unemployed for eight consecutive weeks, but for this purpose no account is to be taken of weeks of sickness or of genuine unemployment (s. 56 (2)). The special benefits to which she is entitled are (1) sickness benefit for not more than six weeks in all; (2) a single maternity benefit, irrespective of arrears, in respect of her first confinement if within two years of her marriage; (3) medical benefit till the 30th June or 31st December first occurring twelve months after she ceased to be employed; and (4) any additional benefits in accordance with the society's scheme. She continues to be an insured person and a member of her society for two years after her marriage (s. 56 (1)).

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[1] S.R. & O., 1929, No. 413.

455. On the other hand, where a woman on marriage continues to be employed for a year thereafter, she never falls under s. 56 (1), but on ceasing to be employed gets the ordinary benefits like other persons throughout their free period of insurance.[1] In the case of such a woman an additional reserve value is credited to her society as at the date of her marriage (s. 56 (6)). On a married woman entering insurance when becoming employed, her position is the same as that of any other insured person, but if she is then entitled to the special benefits under s. 56 (1) she cannot draw at the same time both the special benefits and the ordinary benefits under her new insurance (s. 56 (3)). In no case can a married woman be a voluntary contributor (s. 56 (4)). It is the duty of a woman on marriage to notify her society of her marriage, and if she fails to do so and her society pays her benefit it may deduct any overpayment of benefit from any future benefit (s. 56 (9)).

SUBSECTION (3).—*Members of the Forces of the Crown.*

456. While employment in the Navy, Army, or Air Force is excepted from the scope of compulsory insurance (Schedule I., Part II. (1)), ss. 57 to 61 require members of the forces (other than those holding commissions) to be insured on the terms and conditions therein contained. The members of the forces so insured are "every seaman and marine within the meaning of the Naval and Marine Pay and Pensions Act, 1865,[2] every soldier of the regular forces (not being a soldier of His Majesty's Indian Forces, of the Royal Malta Artillery, or a native soldier of any regiment raised outside the United Kingdom), and every member of the regular Air Force" (s. 57 (1)). Commissioned officers are not insured. During service a sum of 3d. per week is payable in respect of them—whether members of societies or not—by the Admiralty, Army, and Air Council. The object of the lower contributions is, as stated in s. 57 (1), "for the purpose of providing seamen, marines, soldiers, and airmen with such benefits during their term of service and after their return to civil life as are hereinafter mentioned."

457. During service the man of the forces, whether a member of a society or not, is not entitled to medical benefit, sickness benefit, or disablement benefit, but he is entitled to maternity benefit even though both he and his wife are resident outside the United Kingdom (s. 58 (1) and (2) and s. 59 (1)). After discharge he is entitled to the same benefits as any other insured person To meet the case of those men of the forces who are not members of a society, s. 59 establishes a fund called the Navy, Army, and Air Force Insurance Fund, which is a common fund for the United Kingdom, and the members of which are deemed to reside in England (s. 61 (1)). The position of that fund is substantially the same as that of an approved society, but special provision is contained in s. 59 (1) (*e*) whereby a man discharged from service who proves that the state of his health is such that he cannot obtain admission to a society may, on making timeous application, remain a member of the fund and entitled to benefits out of the fund. Originally the members of the fund after discharge were only entitled to the ordinary benefits, but by s. 5 of the National Health Insurance Act, 1926 (by which title Part I. of the Economy (Miscellaneous Provisions) Act, 1926, may be cited), they are entitled to additional benefits in accordance with a scheme made for the purpose. Reference has already been made[1] to s. 60, whereby men of the forces discharged and in receipt of pensions in respect of disablement in the highest degree in consequence of the late war have their sickness or disablement benefit reduced by 7s. 6d. a week, as therein provided.

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[1] See para. 385 *et seq., supra.*

[2] 28 & 29 Vict. c. 73.

SUBSECTION (4).—*Persons employed in the Mercantile Marine.*

458. The general position of persons employed in the mercantile marine is the same as that of other employed persons, but there are a number of variations with regard to benefit and contributions. As mentioned under Employments,[2] by Schedule I., Part I. (*b*), a person employed "under a contract of service as master or a member of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner or, if there is more than one owner, the managing owner or manager resides or has his particular place of business in the United Kingdom," is employed within the meaning of the Act. Secs. 62, 63, and 64, as read along with the interpretation section—s. 132 (2)—contain special provisions with regard to masters, seamen, or apprentices to the sea service or the sea-fishing service. Expressions used in those sections have the same meaning as in the Merchant Shipping Acts, 1894 to 1923. A distinction is drawn between ships in the home-trade ships and foreign-going ships which include ships engaged in regular trade on foreign stations. The ordinary contributions are payable in respect of men on the home service, but in the case of foreign-going ships the employer's contribution is 2½d. a week less than in the ordinary case, and also in calculating arrears four contributions count as five (s. 62 (3)). This last provision does not mean that an employer satisfies five contributions by paying four, but only that in calculating arrears an employed person who has had contributions paid in respect of 42 weeks' employment on a foreign-going ship in a contribution year is treated as if he had had 52 contributions paid in respect of him.

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[1] See para. 433, *supra*.

[2] See para. 368, *supra*.

459. Neither sickness nor disablement benefit is payable to a master, seaman, or apprentice for a period during which the owner of the ship is liable to defray the expenses of the necessary medical advice and attendance and his maintenance, nor is he entitled to medical benefit during that period, but, if he has dependants and the owner is not liable to pay him wages, the sickness benefit is payable at the discretion of the society to the dependants or administered for their benefit (s. 62 (1)). Any period during which benefit is not payable is not to be reckoned as part of the 26 weeks during which sickness benefit may continue (s. 62 (2)).

460. A master, seaman, or apprentice who is neither domiciled nor has a place of residence in the United Kingdom is not regarded as employed within the meaning of the Act and is therefore not insured, but the employer is liable to pay the same contribution in respect of him as he would have had to pay, as employer's contribution, in the case of any other seamen, except where the ship is engaged in regular trade on foreign stations (s. 62 (4)).

461. Contributions in respect of persons employed in the home service are paid by means of stamping contribution cards as in the case of other employed contributors, but contributions in respect of men employed on foreign-going ships, including those payable for non-domiciled seamen, are not now paid by stamping contribution cards but by payments in cash in accordance with the National Health Insurance and Contributory Pensions, Mercantile Marine (Collection of Contributions) Regulations, 1929.[1] Under these regulations the employer fills up a schedule shewing the contributions payable and a document called a voyage card in the case of employed persons over 65, and delivers these to the marine superintendent or consular officer at the termination of the voyage—at the same time paying the officer the total contributions due. These are forwarded to the Ministry of Health in London. The contributions in respect of insured persons are, in the case of members of societies, credited to the societies concerned, less, of course, the appropriate deductions for reserve values, etc., and, in the case of deposit contributors, to the Deposit Contributors Fund. The balance, after meeting the cost of the system of paying contributions otherwise than by stamps, goes to a special fund set up by the Act, called the Seamen's Special Fund (s. 62 (7)). This fund is regulated by s. 64, which makes provision for the governing body containing representatives of shipowners and men, and for that body framing a scheme for providing pensions out of the fund to masters and seamen—preference being given to masters and seamen who have served in foreign-going ships.

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[1] S.R. & O., 1929, No. 591.

462. The National Insurance Act, 1911, provided for the establishment of a society called the Seamen's National Insurance Society, which is now regulated by s. 63 of the Act of 1924. The committee of that society must contain representatives of the Board of Trade, of shipowners, and of members of the society. Any master, seaman, or apprentice who is insured is eligible to become a member of the society, but he may, if he wishes, join any other society. Members of this society are deemed to reside in England, and the society may provide medical benefit to its members by making its own arrangements and not through Insurance Committees (s. 63 (5)).

SECTION 6.—ADMINISTRATIVE MACHINERY.

SUBSECTION (1).—*General.*

463. For the purposes of administering benefits to insured persons, the Act established two separate bodies or authorities—approved societies and Insurance Committees—and except in so far as the benefits of deposit contributors are administered by the Department,[1] all benefits are administered either by approved societies or by Insurance Committees. Approved societies have charge, as regards their insured members, of all the benefits payable in cash, *i.e.* sickness, disablement, and maternity benefits, and also the additional benefits, so far as the administration thereof is not given to Insurance Committees in accordance with the regulations under s. 75 (7). On the other hand medical benefit is administered by Insurance Committees in the case of both approved society members and deposit contributors, and in addition Insurance Committees may by the regulations under s. 75 (7) be given the administration of any additional benefit. The Insurance Committees have also certain duties in connection with the administration of the cash benefits of deposit contributors.

SUBSECTION (2).—*Approved Societies.*

(i) *Constitution, Approval, and Withdrawal of Approval.*

464. Any body of persons corporate or incorporate, whether registered or established under any Act of Parliament or by Royal Charter or not, may be approved by the Department as an approved society if it complies with the requirements of the Act, and a society may establish a separate section for the purposes of the Act, and, if that section is approved, it is treated as an approved society. A branch of a society as such, however, cannot be an approved society (s. 29 (1)). There are three main conditions which a society applying for approval must satisfy before approval will be granted: (1) It must not be carried on for profit; (2) its constitution must provide, to the satisfaction of the Department, for its affairs being subject to the absolute control of its members, and for the election and removal of the governing body of the society by the delegates in the case of a society managed by delegates. Honorary members, as such, must have no right to vote on matters relating to national health insurance (s. 29 (2)); and (3) it must not refuse applicants for membership solely on the ground of age (s. 41 (2)). Subject to these restrictions a society may be as exclusive or as liberal as it pleases in its constitution. Thus it may require a strict medical examination or no medical examination at all, a religious qualification, a political qualification or any lawful condition of membership, provided that the Department approves its rules.

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[1] See Deposit Contributors, paras. 450, 452, 453, *supra.*

465. Approval may be given for one country or for more than one country. If approval is desired for Scotland alone, the Department is the appropriate body, but, if approval is desired for more countries than one, the National Health Insurance Joint Committee is the appropriate body (s. 88 (4)). Once granted, approval may be withdrawn on any of the grounds set forth in s. 38. These grounds include failure to comply with any of the provisions or requirements of the Act relating to societies, or maladministration of the affairs of a society. Approval may in certain circumstances be withdrawn in respect of a country other than the country in which the head office of the society is situated (s. 30 (2) of Act of 1924 and s. 6 of Act of 1928).

466. A branch of a society for the purposes of the Act means only a branch registered under the Friendly Societies Act, 1896, except where the Department recognises another branch as a branch for the purposes of the Act (s. 132 (1)). In the case of the maladministration of the affairs of a branch, whether registered or recognised, the Department may declare that the branch shall cease to be a branch for the purposes of the Act (s. 38 (3)). Sec. 37 makes provision with respect to the dissolution of a society, but dissolution may take place only with the sanction of the Department and in accordance with regulations made by the Department. Secs. 39 and 40 authorise the making of regulations whereby societies or branches may be amalgamated or the engagements of societies or branches transferred to other societies or branches, and regulating the secession, expulsion, and establishment of branches as well as the dissolution of branches. These regulations, which form Parts VIII., IX., XI., and XII. of the approved Societies Regulations, prescribe the procedure to be followed and the financial adjustments required. The consent of the Department is necessary before any amalgamation or other step can take effect.

467. Two special types of society call for mention, the one being the employers' provident fund and the other the county society. The employers' provident fund may be defined as a society consisting of persons entitled to rights in a provident fund established for the benefit of persons employed by one or more employers where the employer, in addition to the employer's contributions under the Act, is responsible for the solvency of the fund or for the benefits payable, or is liable to pay a substantial part of, or to make a substantial contribution to, the benefits payable (s. 31). An employers' provident fund may be approved although the employer is represented on the committee of management, but that representation must not exceed one-fourth. The rules must provide (1) for allowing members to transfer to other societies, if they so wish; (2) for allowing persons who have left the employment of the employer to remain members, if, owing to the state of their health, they cannot get admission to another society; (3) for not making membership of the fund a condition of employment; and (4) for the election by ballot of the members of the committee of management, other than the employer's representatives. If approval of the fund as a society necessitates alteration of the existing rules, the members must be given an opportunity of voting thereon by ballot.

468. As regards county societies, s. 80 (10) of the Act of 1911 empowered a county council, if they thought it desirable to do so, having regard to the number of employed contributors resident in the county, to take steps for the formation of a county society, on the committee of management of which the county council might be represented. The scheme relating to the society might provide for the appointment of officers being subject to the approval of the council, for the security against malversation being given to the Department by means of a charge on the general purposes rate, for the restriction of membership to insured persons resident in the county who were not members of approved societies, and for the reduction of benefits below the minimum fixed by the Act. Sec. 115 of the 1924 Act provides for any county society already formed being carried on in accordance with the scheme, notwithstanding anything inconsistent with the provisions of the Act.

(ii) *Rules for Government.*

469. In accordance with s. 34 every society must as regards health insurance business make rules to the satisfaction of the Department for the government of the society, and, in the case of a society with branches, for the government of the society and its branches, for the determination of disputes between the society and any branch or between two or more branches, and for the administration of benefits by the branches as regards the members of the branch, for the keeping of proper account books by the branches, and for depriving or suspending from the right of administering benefits any branch guilty of maladministration or convicted of an offence.

(iii) *Accounts.*

470. With a scheme like National Health Insurance, the accounts of societies and branches are necessarily complicated. The accounts, which must be kept separate from other accounts of the society and must be in the prescribed form,[1] are subject to audit by Treasury auditors.

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[1] Sec. 72, and the Approved Societies Regulations, Article 40 and Schedule II.

Special provisions are made with regard to the account relating to the administration expenses of a society (s. 73). A separate account must be kept for that purpose, and only a limited sum each year (at present 4s. 6d. per ordinary insured member) may be carried to the credit of that account out of contributions.[1] If the administration account brings out a deficit in excess of a limited prescribed amount, the deficit has to be made good by a special levy on the members. If the auditor in auditing the administration account finds any illegal expenditure, it is his duty to report it to the Department, and if the Department agrees that the expenditure is illegal, it may surcharge the same upon the members or officers authorising or responsible for the illegal payment. This power to surcharge applies only as regards the administration accounts for the year 1929 and subsequent years (s. 15, 1928 Act).

(iv) *Security against Malversation by Officers, Meeting Places, and Donations.*

471. Security must be given to the Department by every society against malversation or misappropriation by officers of the society, except where the only funds coming into the hands of the society are funds required for reimbursing the society sums previously expended by them (s. 35). In the case of an approved society with branches, the security is given by the society on behalf of the branches. In order to protect a society against malversation by its officers, regulations have been made under s. 36. Article 129 of the Approved Societies Regulations applies to National Health Insurance business the provisions of ss. 35, 55, 84 to 89, and 91 to 94 of the Friendly Societies Act, 1896.[2] These sections make provision with regard to such matters as the bankruptcy of officers, summary proceedings for the recovery of moneys from officers, offences by officers, and legal proceedings. The meeting places of approved societies are governed by regulations made under s. 34 (2).[3] Societies which have no disposable surplus on valuation may, with consent of the Department, out of their benefit funds make donations or subscriptions of an eleemosynary character to hospitals, dispensaries, and other charitable institutions, or for the support of district nurses (s. 26).

(v) *Appeals and Disputes.*

472. Sec. 90 (1) requires that every society shall by its rules make provision for the settlement of disputes with its insured members or branches relating to anything done or omitted by the society or branch or the insured members under the Act or any regulations thereunder, or disputes as to whether a person is a member of the society for the purposes of the Act. Under the subsection any aggrieved party may appeal to the Department in accordance with regulations.[1] Disputes under the Act between societies and Insurance Committees, or between two or more societies, or between two or more Insurance Committees, or between Insurance Committees and insured persons, are referred for decision to the Department (s. 90 (2)). The Department may authorise referees to decide any appeal or dispute submitted to them, but it is specifically provided by s. 91 and by Article 184 of the Approved Societies Regulations that in the case of all appeals and disputes submitted to the Department under subss. (1) and (2) of s. 90, the Department's powers are to be exercised through a special body constituted under the regulations. Accordingly the position in general is that the Department does not itself determine any of these appeals or disputes, but refers them for decision to bodies specially appointed. Under s. 114 (5) the Department or the referees appointed by it may, on the application of either party, at any stage of the proceedings, and shall, if directed by the Court, state a case on any question of law for opinion of either Division of the Court of Session. This is not a right of appeal, and a case can be stated only in the course of the proceedings.[2]

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[1] Article 46 of, and Schedule III. to, the Approved Societies Regulations.

[2] 59 & 60 Vict. c. 25.

[3] *Vide* Part XVII. of the Approved Societies Regulations.

(vi) *Valuation.*

473. Sec. 74 requires that the assets and liabilities of every approved society and of every branch of an approved society shall be valued by a valuer appointed by the Treasury every five years, or at such other times as the National Health Insurance Joint Committee may appoint, and provides for the valuation being made on the basis prescribed by regulations. The relative regulations are the National Health Insurance (Valuation) Regulations, 1929.[3] Where the valuation discloses a surplus, the valuer must certify the portion, if any, that he considers to be disposable, and in determining what is disposable he "shall treat as disposable such part only of the surplus as in his opinion may reasonably, having regard to the circumstances and prospects of the society or branch, be expended within the period of the duration of the scheme" (s. 75 (1A)). As explained above,[4] the disposable surplus of a society may be applied in providing additional benefits and making to a very limited extent subscriptions or donations to hospitals, etc., in accordance with a scheme made by the society and approved by the Department, but may not be used to provide death benefits (s. 75 (1) (*a*), (1B), and (3)). In the case of a branch the position is substantially the same, except that the scheme which is made by the branch requires the approval of the society as well as of the Department (s. 75 (1) (*b*)). If, after a scheme has been sanctioned by the Department, a society or branch is found to be in deficiency, no additional benefits may be distributed until the deficiency is extinguished (s. 75 (1) (*c*)).

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[1] *Vide* Part XIV. of the Approved Societies Regulations.

[2] *M'Namara* v. *Scottish Catholic Insurance Society*, 1928, S.L.T. 678.

[3] S.R. & O., 1929, No. 415.

[4] See Additional Benefits, paras. 437, 439, *supra*.

474. Reference should here be made to two funds—the Central Fund and the Contingencies Fund—which have been established as protective funds to provide, as far as reasonably practical, against societies being called on to reduce benefits on account of a deficiency at a valuation. As mentioned below,[1] $\frac{1}{4}$d. out of each weekly contribution paid by or in respect of every insured member of a society is set aside for the purposes of being carried to the credit of the Central Fund and the Contingencies Fund. Normally one-fourth of the $\frac{1}{4}$d. goes to the Central Fund, but, as is the case at present, if the National Health Insurance Joint Committee consider that fund adequate for its purposes, the whole of the $\frac{1}{4}$d. is carried to the Contingencies Fund (s. 67 (1) (*b*)). The Contingencies Fund is apportioned between societies according to the contributions paid in respect of their members, so that each society has a Contingencies Fund of its own (s. 67 (3)). If, on a valuation, a deficiency is disclosed, the society's Contingencies Fund is applied to meet that deficiency (s. 76 (1)). If, however, it is not sufficient, the society is entitled to receive the balance from the Central Fund, provided it satisfies the Joint Committee that the deficiency was due to abnormal sickness or other circumstances beyond its control (s. 77). Where the Contingencies Fund is not required, or only a portion is required, the sum not required is carried to the benefit fund of the society, but is not to be treated as part of the surplus found at that valuation (s. 76 (1)). In the case of a society with branches, every branch has to be separately valued and its surplus or deficiency ascertained, as in the case of a society (s. 74). Each branch, however, has not a Contingencies Fund of its own. The Contingencies Fund is a fund belonging to the society as a whole, but every branch, except where its deficiency is due to maladministration, is entitled to have that deficiency made good out of the Contingencies Fund of the society as far as it will go. If it is not sufficient, the branches which have still a balance of deficiency are entitled to have it made good out of the Central Fund provided it is due to abnormal sickness or other circumstances beyond their control (s. 77). Where the Contingencies Fund of the society is not wholly required for the purpose of meeting the deficiencies of branches, the sum not required is divided up amongst the branches in accordance with the provisions of s. 76 (3).

475. For the purposes of valuation every society having 1000 members is entitled to be treated as a separate unit; but where a society has less than 1000 members, it must either join an association formed or recognised for the purposes of valuation, or be grouped with other small societies in the same position. Associated or grouped societies are treated somewhat on the same lines as if they were branches of a society comprising the associated or grouped societies, except that, in the case of grouped societies, the Contingencies Funds remain the funds of the different societies, subject to having to meet the deficiencies of other grouped societies not able to meet their deficiencies out of their own Contingencies Funds (s. 76 (5) and (6)).

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[1] See Finance, para. 490, *infra.*

476. By Part I. of the Economy (Miscellaneous Provisions) Act, 1926 (the National Health Insurance Act, 1926), a substantial reduction was made in the amount of the Exchequer contribution towards the costs of benefits and administration of benefits, and provision was made by s. 3 of that Act whereby, in the case of a society or branch being in deficiency on valuation, the loss suffered by the society or branch by reason of that Act is made good out of the Reserve Suspense Fund or out of the Central Fund, but that only to the extent of the deficiency. The deficiency for this purpose is the deficiency before application of the society's Contingencies Fund.

477. Having in view these various provisions, the chances of an ultimate deficiency remaining with a society are remote except where there is maladministration. Any deficiency not made good out of the Contingencies Fund or the Central Fund must be made good in one of the ways specified in s. 78, *e.g.* by a reduction in the rate of sickness benefit or in the period during which sickness benefit is payable or by a levy. Provision is contained in s. 78 for the Department taking over for a limited period the administration of any society that fails within six months after the declaration of a deficiency, or such longer period as the Department may determine, to submit a scheme making good the deficiency. Sec. 79 imposes restrictions on the transfer of members from a society in deficiency.

(vii) *Transfer of Membership of Approved Society.*

478. As mentioned above,[1] a person who is a deposit contributor may join a society at any time, but the Act imposes certain limitations on persons voluntarily leaving a society. Sec. 43 provides for membership being terminated only at prescribed intervals, generally once a half year, and on giving the prescribed notice.[2] Unless a member transfers within two years of entering into insurance he must pay a transfer fee—at present 2s. A society may object to a member transferring, and its objection will be sustained if it satisfies the Department that the society will be prejudiced in its administration by the retirement of the member. Sec. 43 (1) (*c*) and (*d*) sets forth special circumstances in which there may be a further limitation on the power to retire from a society. On a person leaving one society and joining another, there is carried from the transferor society to the transferee society a sum called a transfer value, which represents the liability of the old society in respect of the member for the ordinary benefits under the Act, but not for additional benefits (s. 43 (2)). Where a member leaves one society and joins another society, he forfeits the right to any additional benefits resulting from membership of his old society, and as explained above,[1] he is not entitled to additional benefits from his new society until he has been a member of that society for a considerable period (s. 75 (4)). In the case of a member of a branch of a society transferring from one branch to another branch of the same society, substantially the same provisions apply, except that the central authority of the society, instead of the Department, adjudicates on disputed transfers, and there is no transfer fee unless the rules of the society require one. A penalty is provided against the agent of a society who supplies members of other societies with their transfer fee so as to induce them to join his, the agent's, society (s. 43 (4)). On a person ceasing to be insured or on his obtaining a certificate of exemption, he ceases to be a member of a society, but, should he re-enter insurance within a year of ceasing to be a member, he is entitled within a limited period to demand readmission to his old society though he need not avail himself of that right (s. 43 (5)). On a member of a society ceasing to be an insured person, his transfer value is carried to the Reserve Suspense Fund (s. 46), but, in the case of the death of an insured person, his transfer value remains with the society and is a profit to them.

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[1] See Deposit Contributors, para. 451, *supra*.

[2] *Vide* Part VII. of the Approved Societies Regulations.

479. Secs. 44 and 45 contain provisions, which have not been made use of, whereby a person ceasing to reside permanently in the United Kingdom may transfer to a society or institution abroad approved by the Department or remain a member of the society independently of the Act. In such a case there would be transferred to the society or institution abroad or to the society independently of the Act the sum that would have been credited to his account in the Deposit Contributors Fund had he become a deposit contributor.

(viii) *Expulsion.*

480. Societies are given power to expel members in accordance with their rules (s. 41 (2)). The rules must, of course, have been approved by the Department, so this provides a safeguard against a society taking unreasonable powers to expel members. An expulsion is effectual only if carried out in accordance with the rules of the society, and the insured member has a right of appeal to the Department under s. 90 (1). A society may also terminate the membership of an insured person whose arrears exceed a prescribed amount.[2] On expulsion the member loses the right to additional benefits just as if he had voluntarily left the society.

SUBSECTION (3).—*Insurance Committees.*

(i) *Constitution.*

481. The Insurance Committee is a body of the nature of a local authority, set up specially by the Act of 1911 for the purposes of National

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[1] See Additional Benefits, para. 438, *supra.*

[2] Sec. 15 (1) (*b*), and Article 13 of the National Health Insurance (Arrears) Regulations 1930.

Health Insurance, and particularly for the administration of medical benefit. There is an Insurance Committee for every burgh having a population at the census of 1911 of 20,000, and for every county, including therein any other burgh. The burghs of Dumfries and Maxwelltown, which were then separate burghs but are now one burgh, were combined for the purposes of Health Insurance, including the appointment of an Insurance Committee. So also were the counties of Kinross and Clackmannan, and the counties of Moray and Nairn (s. 116 (1) (*a*) and (*b*)). Every Insurance Committee is a body corporate (s. 48 (2)). The number of members of each Committee is determined by the Department, subject to a maximum of 80 and a minimum of 25 (ss. 48 (3) and 112 (1)). Special provisions as to the constitution are made where the number is less than 40 (s. 112 (1)).

482. The members are elected as follows: (1) To the extent of three-fifths, by or on behalf of the insured persons in the area; (2) to the extent of one-fifth, by the town council or county council, who are also to appoint a medical practitioner as a member; (3) two members by the local medical men; and (4) the remaining members by the Department. Deposit contributors and members of approved societies respectively are to be represented in the three-fifths, as nearly as may be in proportion to numbers (s. 48 (3)). In accordance with the National Health Insurance (Insurance Committees) Regulations (Scotland), 1924,[1] made under s. 48, approved societies appoint the persons to represent their insured members. Every society having an insured membership in the area of over the ascertained quota is given direct representation on the Committee according to membership, while societies with less than the quota combine to appoint members. Of the members appointed by the town council or county council two at least must be women (s. 48 (3), prov. (ii)), and, except for the medical practitioner and the women (if women are not on the council), they must all be members of the council (s. 112 (3)). Of the members appointed by the Department, one must be a medical practitioner and two must be women (s. 48 (3) prov. (ii)). Although provision has been made by the statute for the establishment of District Insurance Committees, no District Insurance Committees have been established in Scotland (s. 112 (4)).

483. The Insurance Committees Regulations also, in terms of s. 48 (5), make provision with regard to the appointment, quorum, term of office, and rotation of members, and proceedings generally of Insurance Committees and the employment of officers. On every subcommittee there must be at least one woman (s. 48 (6)). Insurance Committees may now provide superannuation allowances or other retirement benefits to their officers or servants in accordance with a scheme approved by the Department (s. 48 (5) (*a*)). The Department may, and in fact does in the case of every county, authorise an Insurance

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[1] S.R. & O., 1924, No. $\frac{1503}{\text{S. 86}}$.

Committee to repay the travelling expenses of members and to pay the members subsistence allowance and compensation for loss of remunerative time on an approved scale (s. 84). Under s. 49 the Department may, if satisfied of the default of a committee in the performance of its duties as regards the administration of medical benefit or the benefits of deposit contributors, declare the members of the committee to have vacated their offices and make temporary provision for carrying on the work of the committee until a new committee is appointed.

(ii) *Duties.*

484. The main function of Insurance Committees is the administration of medical benefit, in accordance with the National Health Insurance (Medical Benefit) Consolidated Regulations, 1929, made by the Department under s. 24.[1] In addition to laying down the terms of service of doctors and chemists, and making provision for drawing up the lists of doctors and chemists who have agreed to serve, for enabling an insured person to select his doctor, and with regard to the financial arrangements with doctors and chemists, the regulations contain machinery for the settlement of complaints by insured persons against doctors and by doctors against their patients, and of other questions relating to medical benefit. Where a complaint is made by an insured person against a doctor the complaint stands referred to a committee called the Medical Service subcommittee, which consists of equal representatives of insured persons and of doctors with a neutral chairman. That subcommittee determines the facts and makes a recommendation to the Insurance Committee, who decide the action to be taken. From the decision of the Insurance Committee there is an appeal to the Department.[2] The Insurance Committee, subject to the approval of the Department, makes rules for the administration of medical benefit (s. 23). Insurance Committees are empowered by s. 26, on obtaining the consent of the Department, to make subscriptions or donations of an eleemosynary character to hospitals, dispensaries, and other charitable institutions, or for the support of district nurses. As any such subscriptions may be made only out of the General Purposes Fund of the Committee, little use can be made of this power, in view of the limited sources of income of that fund. Insurance Committees are also charged with the duty of making reports required by the Department on the health of insured persons within their areas, furnishing the Department with statistical and other returns, and making provision for lectures and the publication of information on health (s. 50).

485. Under s. 51, Insurance Committees are bound to consult on general questions relating to medical benefit with any local medical committee representing the doctors resident in the area and recognised for the purpose. Secs. 52 and 53 make provision for the constitution of two committees, known as the Panel Committee and the Pharmaceutical Committee, representing respectively the doctors and chemists who have agreed to provide service for medical benefit. The Medical Benefit Regulations require the Insurance Committee to consult with these committees on various general matters, and impose duties on these committees in connection with excessive prescribing by doctors and other matters. The Insurance Committees may, if authorised by the Department, make contributions of a limited amount towards the administration expenses of Panel and Pharmaceutical Committees out of the sums available for medical benefit (s. 86), and by virtue of s. 87 may subscribe towards an Association of Insurance Committees.

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[1] See Medical Benefit, para. 410 *et seq.*, *supra.*

[2] *Ibid.*, para. 415, *supra.*

486. Insurance Committees may combine or may be combined for any purpose in which they are concerned (s. 48 (7)), and this has been done for the purpose of checking chemists' accounts, the committee formed for the purposes of the combination entitled the Drug Accounts Committee.[1]

(iii) *Accounts.*

487. The accounts of Insurance Committees, which must be in the prescribed form,[2] are subject to audit by Treasury auditors, and, in connection with that audit, provision is made for the surcharge by the Department of members or officers of the Committee in connection with any items of illegal expenditure, or any failure to bring money into account which are reported to them by the auditor (ss. 82 and 112 (6), and Schedule IV., Part II.).

SECTION 7.—FINANCE.

SUBSECTION (1).—*General.*

488. The cost of benefits and of the administration of benefits is payable partly out of contributions and partly from Exchequer moneys. The Exchequer pays one-seventh in the case of men and one-fifth in the case of women, and the balance is defrayed out of contributions, which, for this purpose, include, *e.g.*, interest earned on the proceeds of contributions when invested (s. 4). As explained above,[3] the employer or voluntary contributor has, for the purpose of paying contributions, to purchase stamps at the Post Office. The sums received by the Post Office on account of contribution stamps sold are regularly paid over by them to the Department and credited by the Department to the Scottish National Health Insurance Fund, which fund is under the control and management of the Department (s. 111 (2)). There are similar funds for England, Wales, and Northern Ireland. In the case of a society approved for, say, England and Scotland, the contributions in respect of the members resident in England go into the

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[1] See Part V. of the Insurance Committees Regulations.

[2] Sec. 82, and the Insurance Committees Regulations, Part VI.

[3] See Contributions, para. 390 *et seq.*, *supra.*

English National Health Insurance Fund, and similarly the Scottish members' contributions go into the Scottish Fund. Provision is made for the National Health Insurance Joint Committee making any necessary financial adjustments between the various National Funds (s. 88 (4)).

489. Contribution cards, which have a currency of about six months, are on their expiration surrendered by the insured members to their society, which in turn forwards them to the Department. The Department thereupon credits the account of the society in the Fund with the sum representing the contributions, under deduction of the sums which, as explained below, have to be set aside out of each weekly contribution under s. 67 to meet reserve values, etc. There are also credited to the society's account in the Fund the Exchequer contribution towards the cost of benefits and administration of benefits and any other sums payable to the society by the Department, *e.g.* in respect of interest or of the redemption of reserve values. All sums paid out to the society for the purpose of meeting the cost of benefits and administration as well as sums payable by the society to Insurance Committees for the cost of medical benefit and administration are debited to the society's account in the Fund. The Fund is in the position of a banker for the societies. Similarly every Insurance Committee has an account in the Fund. To that account are credited the sums payable to the Committee for medical benefit and administration, including the appropriate Exchequer grant, and all sums paid out to the Committee are debited to the account. There are many other accounts in the Fund, *e.g.* the Deposit Contributors' Fund has an account.

490. Sec. 67 requires that out of each weekly contribution in respect of every member of a society two sums are to be set aside—(1) a sum equal to $\frac{17}{20}$ths of a penny in the case of a man, and $\frac{11}{20}$ths of a penny in the case of a woman, which is to be applied in paying off the sums credited to societies in respect of reserve values [1] and in paying interest thereon; and (2) a sum of $\frac{1}{4}$d. in respect of both men and women, for the purpose of being credited to the Contingencies Funds of societies and to the Central Fund.[2] No such deductions are made in the case of the ordinary deposit contributor, who derives no advantage from reserve values or these protective funds.

491. The Scottish National Health Insurance Fund is subject to audit by the Comptroller and Auditor-General (s. 65 (3)).

SUBSECTION (2).—*Reserve Values.*

492. It is obvious that a scheme which provides uniform benefits in return for uniform contributions, irrespective of the age of persons at entry into insurance, is possible only by the adoption of some special method that will compensate a society accepting members over the age on the basis of which the contributions were fixed. Accordingly s. 66

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[1] See Reserve Values, para. 492, *infra.*

[2] See Approved Societies. Valuation, para. 474, *supra.*

provides that, on a person of the age of 17 or upwards joining an approved society, a sum called a reserve value, which represents the estimated loss arising through the acceptance by the society of that person as a member, shall be credited to the society. The section provides for a table of reserve values being drawn up, and that table has been prepared, having regard only to the age of the person at the time of joining the society. No account has been taken, *e.g.*, of the occupation of the insured or of the state of his health. The reserve value is credited to the society in the books of the Department, and it bears interest at the rate of 3 per cent. The sum, set aside out of each weekly contribution under s. 67 (1) (*a*), is applied, first, in paying the interest, and thereafter in liquidating the reserve values, so that the credit to societies, which originally was a paper credit, is gradually being turned into cash. At 31st December 1928 the reserve values credited to societies in the books of the Department amounted to about £5,000,000, and it is estimated that these will not be fully liquidated until the year 1955. When the reserve values are ultimately written off, such further benefits as Parliament may determine are to be provided (s. 11). A special reserve value is provided for women who, on marriage, continue to be employed (s. 56 (6)). Reserve values are credited to societies, not only on a person entering insurance, but on his becoming a member after being a deposit contributor. In that case, however, the reserve value takes the form of a transfer value as if the person had transferred from one society to another (s. 55 (2)).[1]

493. In connection with reserve values there has been set up a fund called the Reserve Suspense Fund (s. 69). That fund is to provide reserve values falling to be credited to societies, or such portion thereof as may be prescribed, and to that account are carried all transfer values in respect of persons who cease to be insured otherwise than on death (s. 46). As mentioned above,[2] the Reserve Suspense Fund has to contribute to any deficiency on valuation attributable to the National Health Insurance Act, 1926. When an insured person attains the age of 65, he remains insured for the rest of his life and entitled to medical benefit, although no further health insurance contributions are payable in respect of him (ss. 3 (7) and 7 (3)). To meet the cost of the medical benefit and the administration thereof throughout the insured person's life, a sum is debited to the society in the National Health Insurance Fund and credited to the Reserve Suspense Fund, and thereafter the Reserve Suspense Fund meets all sums payable in respect of the medical benefit of members of societies over 65 (s. 69 (3)).

SUBSECTION (3).—*Transfer Values.*

494. As mentioned above,[3] on a person transferring from one society to another there is debited to the transferor society and credited to the transferee society a sum called a transfer value representing the liability of the transferor society for ordinary benefits, but not additional benefits (s. 43 (2)). On a deposit contributor joining a society, the society is credited from the Reserve Suspense Fund with a transfer value (s. 55 (2)).

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[1] See Transfer Values, para. 493, *infra.*

[2] See Approved Societies, Valuation, para. 476, *supra.*

[3] See Approved Societies, Transfer of Membership, para. 478, *supra.*

SUBSECTION (4).—*Central Fund.*

495. This fund and the Contingencies Funds of societies form the main bulwark against reductions of benefits due to deficiencies on valuations of societies.[1] This fund, which is a United Kingdom fund under the control of the National Health Insurance Joint Committee, is made up from various sources. The Exchequer is liable to contribute £145,000 a year and the Northern Irish Exchequer £3000 a year, but if it is found, as is the case at present, that the sums at the credit of the fund are sufficient for the purpose, these Exchequer contributions are suspended, and the $\frac{1}{16}$th of a penny set aside out of each weekly contribution in respect of members of societies under s. 67 (1) (*b*) for the Central Fund is carried to the Contingencies Fund instead (s. 68 (1) prov.). Nine-tenths of the sums representing stamps sold without any claim by societies or deposit contributors for contributions are also credited to the fund (s. 68 (2)). Sec. 4 of the National Health Insurance Act, 1926, imposes a charge on the Central Fund for the purpose of assisting societies in excusing arrears of contributions for their members and for certain other limited purposes.

SUBSECTION (5).—*Investments.*

496. The Department has periodically to ascertain the portion of the sum at the credit of the account of each approved society and of the Deposit Contributors' Fund which it considers available for investment, after allowing a margin for estimated claims. The sum so ascertained is carried to an account known as the Investment Account (s. 70). A society may obtain payment of one-half of this sum, and itself invest it in any trust investment or in any investments issued by a local authority within the meaning of the Local Authorities Loans (Scotland) Acts, 1891 and 1893, or in any other investment approved by the Department. Alternatively it may allow the whole sum to remain at the credit of the Investment Account, or it may require the Department to invest in its own name for behoof of the society one-half in any investment in which the society might have invested the money (s. 71 (1)). The sums in the Investment Account are paid over to the National Debt Commissioners and invested by them in securities for the time being authorised by Parliament as investments for Savings Bank funds. All dividends on the sums at the credit of a society in the Investment Account are credited to the society in its account in the Scottish National Health Insurance Fund, and are applied towards the payment of benefits and for administration (s. 71 (4)). The rate of interest on the sums at the credit of societies in the Investment Account is such rate as may be prescribed by the Department with the approval of the Treasury—at present 4½ per cent.[1] In the case where a society itself invests the one-half of the sum available for investment, or requires the Department to invest the sum for it, any loss or profit on the investments is borne by or accrues to the society, but, as regards sums in the Investment Account, the society is entitled to get repayment of the whole sum when required, no matter in what investments it may have been placed by the National Debt Commissioners. The Department also invests temporarily large sums of money in the Scottish National Health Insurance Fund through the National Debt Commissioners (s. 70 (1) prov.), and every society having a balance at its credit in the fund gets its due proportion of the interest so earned.[2]

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[1] See Approved Societies, Valuation, para. 474, *supra.*

SECTION 8.—POSITION OF LOCAL AUTHORITIES UNDER ACTS.

497. Local authorities are not closely concerned with the administration under the National Health Insurance Acts. As already mentioned,[3] county councils and the town councils of burghs with a population of 20,000 or upwards at 1911 are charged with the duty of appointing members to the Insurance Committee for the area. The smaller burghs which are within the county for this purpose, if not already represented, are to be represented on the county council (s. 116 (1)), but this will not be necessary after 15th May 1930, when, as a result of the Local Government (Scotland) Act, 1929,[4] all these burghs will be represented on the county council. Provision is made by ss. 83 (4) and 85 whereby local authorities may contribute towards the expenditure of Insurance Committees, but practically no use has been made of these powers. Any expenses of a county council are to be defrayed out of the general purposes rate, and any expenses of a town council or a district committee out of the public health general assessment (s. 113).

SECTION 9.—POWERS AND DUTIES OF THE CENTRAL DEPARTMENT.

SUBSECTION (1).—*Regulations and Special Orders.*

498. The Department of Health, in addition to its general administrative powers and duties as the Government Department concerned with National Health Insurance, has certain powers by virtue of which it may exercise a wide discretion as to the manner in which the provisions of the Acts are carried into effect. It is the function of the Department, alone in some cases, of the Joint Committee and the Department jointly in other cases, and of the Joint Committee alone in other cases, to make regulations for the purpose of prescribing anything which is required to be prescribed or for the purpose of carrying the Act into effect (s. 93 (1)). The regulations, when made, have to be laid before Parliament, and "shall have effect as if enacted in this Act," subject to the right of Parliament to annul the regulations (s. 93 (2)). In the *Glasgow Insurance Committees* v. *Scottish Insurance Commrs.*,[1] following the observations of the judges in the *Institute of Patent Agents* v. *Lockwood*,[2] it was held that, as a result of the words quoted, the regulations could not be challenged in a Court of law, but could be set aside only by means of the Parliamentary procedure provided by the section.

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[1] Article 26 (1) of the Approved Societies Regulations.

[2] Article 26 (2) of the Approved Societies Regulations.

[3] See Insurance Committees, para. 482, *supra*.

[4] 19 & 20 Geo. V. c. 25.

499. The Department has also power under various sections to make Special Orders, and the procedure for making these Orders is contained in s. 94. The draft of the Order has to be published, and, if objections are lodged and not withdrawn, an inquiry by an impartial person must be held. The Special Order has to lie before each House of Parliament for thirty days before it comes into effect. The provision in s. 93 (2), whereby regulations are to have effect as if enacted in the Act, does not apply to Special Orders, so it is assumed that any such Order might be challenged in a Court of law on the ground of its being *ultra vires.* Any Special Order may be revoked or varied by a subsequent Order (s. 95).

SUBSECTION (2).—*Judicial Functions.*

500. Under "Employments," "Medical Benefit," "Approved Societies," and "Insurance Committees,"[3] reference has already been made to the judicial functions of the Department in connection with the decision of questions of employment, and of appeals and disputes.[4]

SUBSECTION (3).—*Expenses.*

501. The expenses of the Department (other than those relating to certain minor services, such as the administration of the Deposit Contributors Fund and the Exempt Persons Fund) are defrayed out of moneys voted by Parliament, and not out of the Scottish National Health Insurance Fund.

SECTION 10.—MISCELLANEOUS.

SUBSECTION (1).—*Exemptions from Stamp Duty.*

502. By virtue of s. 100, receipts for benefit, bonds by way of security given by approved societies, and other documents specified in the section, are exempt from stamp duty.

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[1] 1915, S.C. 504.

[2] 1894, 21 R (H.L.) 61.

[3] See paras. 379, 415, 472, and 484.

[4] Secs. 89 and 90, and the National Health Insurance (Medical Benefit) Regulations, 1929.

Subsection (2).—*Cheap Birth, etc., Certificates.*

503. Under s. 101 (1), a birth certificate, for the purposes of National Health Insurance, may be obtained at a cost of 6d., and a marriage certificate at a cost of 1s., and s. 101 (2) authorises the making of regulations for obtaining death certificates at a reduced charge. Regulations under s. 101 (2), however, have been made only as regards deposit contributors.

Subsection (3).—*Protection against Diligence.*

504. Sec. 102 contains provisions with a view to protecting an insured person in receipt of sickness benefit against the use of diligence or other proceedings, where the medical practitioner certifies that the using of diligence or other proceedings may endanger the life of the insured person.

Subsection (4).—*Inquiries into Excessive Sickness.*

505. Sec. 107 provides for inquiries into the causes of excessive sickness at the instance of approved societies, where it is alleged that the excessive sickness is due to the conditions or nature of employment, or bad housing, or insanitary conditions, or an insufficient or contaminated water supply, or neglect on the part of any person or authority to observe or enforce the provisions of any Act relating to the health of workers in factories, workshops, mines, quarries, or other industries, or relating to public health, or the housing of the working classes, or any regulations made under any such Act, or to observe or enforce any public health precautions. Any extra expenditure proved to be attributable to any of the above-mentioned conditions is recoverable from the person responsible for these conditions. Since the inception of National Health Insurance no proceedings have been taken in Scotland under this section.

NATIONALITY.

See ALIENS; INTERNATIONAL PRIVATE LAW.

NATIONS, LAW OF.

See INTERNATIONAL LAW.

NATURALISATION.

See ALIENS.

NATURAL OBLIGATIONS.

See OBLIGATIONS.

NAUTÆ, CAUPONES, STABULARII.

See CARRIAGE BY LAND; INNKEEPERS.

NAUTICAL ASSESSORS.

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SECTION 1.—THE NAUTICAL ASSESSORS (SCOTLAND) ACT, 1894.

506. Unlike the case in England, where the practice of inviting persons of skill to assist the Court in questions of nautical skill and experience is of early origin, and dependent on the usages of the Court of Admiralty, the employment of nautical assessors in Scotland is modern and statutory, being regulated by the Nautical Assessors (Scotland) Act, 1894.[1] With certain modifications, to be noted later, the Act embodies the practice followed in England, and English decisions may in general be followed. The Act provides that, both in the Court of Session and in the Sheriff Court, in cases "arising out of or relating to collision at sea, salvage, towage, or any other maritime matter," the Court may, if it thinks fit, and shall on the application of any party, "summon to its assistance at the trial or at any subsequent hearing, whether on reclaiming note, appeal, or otherwise, one or more persons of nautical skill and experience who may be willing to act as assessors." It is further provided that objection to any assessor, either personally or in respect of his qualifications, may be taken by any party to the case and disposed of by the Court.[2] Procedure on objection is regulated by Act of Sederunt.[3]

SECTION 2.—APPOINTMENT AND REMUNERATION.

SUBSECTION (1).—*In the Sheriff Court.*

507. The assessors are appointed by the Court from a list approved for the purpose by the Sheriff of the sheriffdom and kept by the sheriff-clerk. Preparation of the list may be deferred until an application for appointment is made.[1] The number authorised is, in the case of a proof, one, and, in the case of a hearing on appeal, one or more, as the Court may think fit.[2] Remuneration of £4, 4s. per day with maintenance and travelling expenses is allowed. Special provision is made for the case of assessors resident out of Scotland, or at a distance from the seat of the Court.[3]

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[1] 57 & 58 Vict. c. 40.

[2] *Ibid.*, s. 2.

[3] C.A.S., 1913, A, viii. 3 and 7; L, i. 1.

Subsection (2).—*In the Court of Session.*

508. The assessors are appointed by the Court from a list approved for the purpose by the Lord President and kept by the principal clerk of Court. The list is drawn from officers of the Royal Navy, and from officers of the Merchant Navy who hold an extra master's certificate. On occasion, in cases of difficulty, the Court, if desired by either party, will apply to Trinity House to nominate an Elder Brother. In the Outer House one assessor is appointed. In the Inner House the number is in the discretion of the Court.[4] Usually one only is summoned, but occasionally, in cases of difficulty, two. Remuneration is the same as in the Sheriff Court.

Subsection (3).—*In the House of Lords.*

509. In appeals in actions to which the Act applies, the House of Lords may call in one or more assessors specially qualified, and hear the appeal wholly or partially with their assistance.[5] Their appointment is made either *ex proprio motu* (by the Lord Chancellor or the Lord Speaker) or on written application of either party to the clerk of the Parliaments. The assessors are selected from a list of officers of the Royal Navy and of Elder Brethren of Trinity House kept by the clerk of the Parliaments.[6] By Order this number is fixed at two, one of whom requires to be an officer, active or retired, of the Royal Navy, and one an Elder Brother of Trinity House. Remuneration is £3, 3s. for each day or part of a day's attendance, together with travelling expenses and a subsistence allowance of £1, 1s. for each day or part of a day's attendance.[7]

Section 3.—Functions.

Subsection (1).—*Advice.*

510. Nautical assessors are not members of the Court, and are therefore not entitled, as such, to deliver judgment. Their chief function is to advise the Court on such questions of nautical skill and experience as it thinks fit to submit to them. On such questions the Court will be slow to disregard their advice, but it will not surrender its independence of judgment.[1] It is within the province of the Court to determine what are and what are not questions of nautical skill and experience. Generally they are questions concerning the management and manœuvring of ships.[2] Questions concerning the stowage of cargo are not questions of nautical skill and experience; [2] nor are questions concerning the conclusions as to speed to be drawn from the nature and extent of the fractures which one ship has made in the hull of another; [3] nor questions concerning the conclusions as to speed, based on mathematical calculations, to be drawn from the apparent direction of sound.[4] It has been held, perhaps wrongly, that the question whether or not screw alleys are liable to emit smells which may damage sensitive cargo stowed in the vicinity is one for assessors.[5]

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[1] 57 & 58 Vict. c. 40, s. 4.

[2] C.A.S., 1913, L, i. 1.

[3] C.A.S., 1913, A, viii. 8 ; A.S., 25th June 1919.

[4] C.A.S., 1913, A, viii. 7.

[5] 57 & 58 Vict. c. 40, s. 6.

[6] House of Lords Orders, 1923, R. 40.

[7] *Ibid.*, App. E.

SUBSECTION (2).—*Evidence.*

(i) *In Trial Court.*

511. It has been stated, inaccurately, that the opinion of a nautical assessor is not evidence but a substitute for evidence.[6] More correctly it is evidence of a special character. Nautical assessors are witnesses of fact whose evidence the Court is bound to consider impartially, but whom parties are not entitled either to examine or to cross-examine. Further they differ from other skilled witnesses in respect that they do not appear as partisans of one side nor of the other.[7] In England the practice is to exclude expert evidence on questions of nautical skill and experience where nautical assessors are present. In Scotland formerly the practice was to admit such evidence. Recently, however, the opinion was expressed that such discrepancy in practice was inappropriate,[8] and since then Scots practice has conformed with that of England.

(ii) *In Appellate Court.*

512. The peculiar nature of the evidence of nautical assessors is specially apparent in an appellate Court, more particularly in cases where their opinion differs from that of the assessors in the trial Court. In such cases, as is natural, there is generally a marked tendency in the appellate Court to prefer the evidence of its own assessors.[9] Such discrimination is wrong. It has been pointed out that assessors in an appellate Court are not substitutes for those in the trial Court, but additional to them. The appeal is not from one assessor to another, and the Court is not entitled to surrender its judicial function on any question however technical.[1] The appellate Court should estimate the evidence of all the assessors in both Courts impartially. If, nevertheless, it is unable to reach a conclusion on the question raised it should treat the point as not proven, and the onus of proof as undischarged by the party on whom it rests.[1] It has been observed that in cases where nautical assessors have been absent from the trial Court it is inappropriate that they should be present in the appellate Court, since their presence is equivalent to the admission of fresh evidence.[2]

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[1] *The* " *San Onofre* " (No. 1), 1919, 35 T.L.R. 507, per Lord Birkenhead L.C. at p. 507; *The* " *Australia*," [1927] A.C. 145.

[2] *The* " *Sir Robert Peel*," 1880, 4 Asp. M.L.C. 321, per Brett L.J. at p. 322.

[3] *The* " *Dromedary*," 1895, 22 R. 237, per Lord Pres. at p. 243.

[4] *The* " *Linn o' Dee*," 1906, 8 F. 1013.

[5] *The* " *Assyrian*," 1890, 6 Asp. M.L.C. 525.

[6] *The* " *Tynwald*," [1895] P. 142, per President at p. 146.

[7] *The* " *Australia*," [1927] A.C. 145, per Lord Dunedin at p. 149; *The* " *Tovarisch*," 1929, 35 Ll.L. Rep. 183, per Scrutton L.J. at p. 185.

[8] *The* " *Alconda*," 1923 S.C. 526, per Lord Hunter at p. 542.

[9] *The* " *Jupiter*," (No. 1), 1927, 28 Ll.L Rep. 224, per Scrutton L.J. at p. 228; *The* " *Tovarisch*," *supra*, per Scrutton L.J. at p. 185.

(iii) *In the House of Lords.*

513. In the House of Lords, where the appointment of assessors is discretionary, their presence is less frequently required than in the lower Courts, since the issues have already been narrowed and the evidence of assessors incorporated in the judgments already delivered. In cases originating in the Sheriff Court, under the Judicature Act, 1825,[3] where final findings in fact have already been pronounced in the Court of Session, and it is not competent to extract further findings in fact from the opinions delivered by the judges,[4] it is not the practice to employ assessors in the House of Lords. Their employment in such cases is in fact generally unnecessary. Since the decision that assessors are not merely technical advisers of the Court but also witnesses of fact,[5] it would appear that it is also incompetent. This question, however, has not yet been considered judicially.

SUBSECTION (3).—*Questions.*

514. Not being members of the Court, the assessors are not entitled to question witnesses. The Act [6] contemplates that in all cases the trial judge shall put written questions to the assessors and shall receive written answers. The value of this practice in the event of an appeal, and the need for strict compliance with it, has been emphasised both in Scotland [7] and in England,[8] and in Scotland it is now invariably followed both in trial and in appellate Courts. It is the duty of the Court to reach a conclusion on the proved facts and "from them, if necessary, to evolve with much accuracy the expert questions on which the advice of the nautical assessors is to be obtained." [1] The questions should not take such a form as to be equivalent to inviting the assessor to state whether he would find for the pursuer or for the defender.[2]

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[1] *The* " *Australia,*" [1927] A.C. 145, per Lord Sumner at p. 151.

[2] *Anghelatos* v. *Northern Assurance Co.*, 1923, 15 Ll.L. Rep. 154, per Bankes L.J. at p. 155.

[3] 6 Geo. IV. c. 120, s. 40.

[4] *The* " *Alconda,*" 1925 S.C. (H.L.) 66, per Lord Dunedin at p. 71.

[5] *The* " *Australia,*" [1927] A.C. 145.

[6] 57 & 58 Vict. c. 40, s. 3.

[7] *The* " *West Camak* " ; *The* " *Clan Malcolm,*" 1923 S.C. 316, per Lord Pres. at p. 342.

[8] *The* " *San Onofre,*" 1919, 35 T.L.R. 507, per Lord Birkenhead L.C.

SUBSECTION (4).—*Inspection of Ships.*

515. In England any party to an action in the Admiralty Division may apply for an Order for the inspection by the nautical assessors, or by the party himself or by his witnesses, "of any ship or other personal or real property, the inspection of which may be material to the issue of the cause." [3] Under this provision, not only have ships been inspected, but experiments with them have been attended. Thus, in one case, by adjourning with its assessors to attend a tank demonstration, the Court obtained important evidence on the influence of suction in inducing a collision.[4] Similarly assessors have been directed to test, *in situ*, the visibility of a ship's navigation lights.[5] Where assessors have thus inspected a vessel and reported to the Court, their report need not be confined to matters on which evidence has been led, but may include any facts which affect the merits of the case.[6] The inspection should be postponed until after the hearing of the case, since otherwise there would be a tendency to substitute their opinion, in matters in which they are not directly concerned, for the evidence of the other witnesses.[7] In Scotland, it is thought, the power of ordering the inspection of ships is inherent in the admiralty jurisdiction of the Court, and would be exercised should occasion arise.

SECTION 4.—ASSESSORS AND JURY TRIAL.

516. It is now settled practice to decline to send a case to jury trial, in cases where a nautical assessor has been applied for. Since questions which are appropriate for an assessor are from their nature inappropriate for a jury, where applications are made for both forms of trial, that for jury trial should be refused.[8] Additional reasons for the rule are, that a jury is bound to decide in accordance with the evidence led; that the presence of assessors excludes evidence on questions of nautical skill and experience; and that it would be inconsistent with their oath for a jury to be guided by an assessor. It appears therefore that the common law right to trial by jury is elided in cases to which the Act applies.

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[1] *The* " *Australia*," [1927] A.C. 145, per Lord Carson at p. 157.

[2] *The* " *Australia*," *supra*, per Lord Dunedin at p. 149.

[3] Admiralty Court Act, 1861 (24 Vict. c. 10), s. 18; R.S.C., O. 50, r. 3.

[4] *The* " *Olympic*," [1913] P. 214.

[5] *The* " *Cumberland Queen*," 1921, 6 Ll.L. Rep.. 117, 280; cf. *The* " *Marathon*," 1879, 4 Asp. M.L.C. 75; *The* " *Victor Covacevich*," 1885, 10 P.D. 40.

[6] *The* " *Marathon*," *supra*.

[7] *The* " *Victor Covacevich*," *supra*.

[8] *M'Lean* v. *Johnstone*, 1906, 8 F. 836; *Leadbetter* v. *Dublin and Glasgow Steam Packet Co.*, 1907 S.C. 538; *Kerr* v. *Screw Collier Co.*, 1907, 15 S.L.T. 444; *Rodger* v. *Glen Coats*, 1913, 1 S.L.T. 434.

SECTION 5.—ASSESSORS FOR SPECIAL PURPOSES.

SUBSECTION (1).—*Pilotage Appeals.*

517. In appeals by a pilot to the Sheriff Court against the action of the pilotage authority with reference to his licence, the Court is required to sit with an assessor "of nautical and pilotage experience" selected and summoned by itself.[1] The provisions of the Nautical Assessors (Scotland) Act, 1894,[2] and the relative Acts of Sederunt are expressly made applicable.[3]

SUBSECTION (2).—*Summary Salvage Disputes.*

518. In the summary determination of salvage disputes under the Merchant Shipping Act, 1894,[4] the Court may call in the assistance, as assessor, of "any person conversant with maritime affairs." [5] It appears to be intended that the ordinary procedure of the Court should be followed,[6] and accordingly the position of the assessor is regulated by the Nautical Assessors (Scotland) Act, 1894,[7] and relative Acts of Sederunt.[8]

SUBSECTION (3).—*Investigations and Inquiries.*

519. In investigations of shipping casualties and in inquiries into the conduct of officers of the Merchant Navy under the Merchant Shipping Acts, the Court is required to hold the same "with the assistance of one or more assessors of nautical, engineering, or other special skill or knowledge." [9] The position of such assessors differs in important respects from that of nautical assessors in a Court of law. Special provision is made for their appointment and qualifications.[10] They may address questions to the witnesses. They are not required to answer questions addressed to them by the Court, but assist the Court in answering the questions addressed to it by the Board of Trade. If they concur in the report of the Court they are required to sign it, and if they dissent they are required to state their reasons in writing.[11] The concurrence of one at least is required for the cancellation or suspension of an officer's certificate.[12] Their position thus approximates more to that of a member of the Court than to that of an assessor proper. The practice of Courts of law is so far followed that in questions of nautical skill and experience the evidence of skilled witnesses is excluded,[1] but the rule is not followed on other technical questions. In rehearings of and in appeals from Courts holding investigations and inquiries,[2] and in appeals from naval Courts,[3] special provision is made for the presence of assessors. In such cases their position approximates closely to that of assessors in appellate Courts of law.

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[1] Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), ss. 28 (2) (7) and 60.

[2] 57 & 58 Vict. c. 40.

[3] C.A.S., 1913, L, i. 11; A.S. 29th October 1919.

[4] 57 & 58 Vict. c. 60.

[5] *Ibid.*, s. 548 (2).

[6] *Thirtle* v. *Copin*, 1912, 29 Sh. Ct. Rep. 13, at p. 19.

[7] 57 & 58 Vict. c. 40.

[8] C.A.S., 1913, L, i. 11; A.S. 29th October 1919.

[9] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 466 (3) (4).

[10] Shipping Casualties and Appeals and Re-hearings Rules, 1923, R. 22-26, App., Pt. II.

[11] 57 & 58 Vict. c. 60, s. 466 (7).

[12] *Ibid.*, s. 470 (1) (*a*).

SUBSECTION (4).—*Courts of Survey.*

520. A Court of Survey consists of a judge sitting with two assessors "of nautical, engineering or other special skill and experience."[4] Special provision is made for their appointment.[5] For the purposes of the Act, the assessors have all the powers of a Board of Trade Inspector under the Act.[6] Generally their position approximates to that of assessors in Courts holding investigations and inquiries.

SECTION 6.—EXPENSES.

SUBSECTION (1).—*In Courts of Law.*

521. In the Court of Session where the application for the appointment of an assessor is made by either party, it is only granted on the condition that the party making it consigns with the Principal Clerk of Session such sum to meet the fees and expenses of the assessor as the Court may determine. Where the assessor is appointed *ex proprio motu* of the Court, consignation is made by the pursuer.[7] The sum required is usually £25. In the Sheriff Court the rule is the same, consignation being made with the sheriff-clerk.[8] The Act expressly provides that the remuneration of the assessors "shall be treated as expenses in the action or proceeding unless otherwise ordered by the Court."[9] Generally it is so treated, but it has been observed that there is no settled practice.[10] In the House of Lords, failing a special order of the House on the subject, their expenses are paid "by the suitor against whom costs are awarded, or by his agent, into the Fee Fund of the House immediately after the determination of the Cause."[11]

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[1] *The "Kestrel,"* 1881, 6 P.D. 182.
[2] 57 & 58 Vict. c. 60, s. 475; R. 20 (*e*).
[3] Merchant Shipping Rules, 1908, No. 446/L. 15, R. 1 (*g*).
[4] 57 & 58 Vict. c. 60, s. 487.
[5] Rules of the Court of Survey, 1876, R. 10–11.
[6] 57 & 58 Vict. c. 60, s. 488 (2).
[7] C.A.S., 1913, A, viii. 9.
[8] C.A.S., 1913, L, i. 3.
[9] Sec. 5.
[10] *Hay* v. *Ocean S.S. Co.*, 1917, 54 S.L.R. 354.
[11] House of Lords Orders, 1923, App. E.

Subsection (2).—*In Investigations and Inquiries.*

522. In investigations and inquiries, since there is no provision for the taxation of costs, the expenses of the assessors are treated as costs of the proceeding. They are incurred by the Board of Trade, and are paid jointly by the Board, by the Treasury, and by H.M. Stationery Office. The Court may, however, make such order regarding costs as it thinks fit.[1] Frequently the order is used as a penalty.

523. In appeals from Courts of investigation or inquiry, unless the appeal is brought by the Board of Trade, the appellant is required to find such security for costs as the judge from whom the appeal is taken may direct.[2] Where an appellant had thus consigned security for costs, the Board of Trade, following the practice in England, declined to allow the appeal to proceed unless additional security was found for the expenses of the assessors. The Court refused to order additional security, and directed that the security for costs already found should be delivered to the clerk of the process to be applied in the first instance to meet the expenses of the assessors.[3]

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[1] M.S. Act, 1894 (57 & 58 Vict. c. 60), s. 466 (8).

[2] Shipping Casualties and Appeals and Re-hearings Rules, 1923, R. 20 (*c*).

[3] *Thain* v. *Board of Trade*, 1923 S.C. 548 ; 14 Ll.L. Rep. 138, 200, 381, 514.

NAVAL MARRIAGES.

See MARRIAGE.

NAVAL RESERVES.

NAVY.

See ARMED FORCES OF THE CROWN.

NAVIGATION.

See PORTS AND HARBOURS; RAILWAYS AND CANALS.

NEGLIGENCE.

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SECTION 1.—GENERAL.

SUBSECTION (1).—*Introductory.*

524. Negligence is a form of delict consisting of the breach of a duty to take reasonable care, and is sometimes equated with the *quasi*-delict of the Roman law.[1] It thus stands opposed to malice, the essence of which is an intention to injure.[2] This contrast is pointed by Erskine [3] when he says that "wrong may arise, not only from positive acts of trespass or injury, but from blameable omission or neglect of duty."

GENERAL AUTHORITIES.—Glegg on Reparation, 2nd ed., 1905; Guthrie Smith on Damages, 2nd ed., 1889; Bankt. i. 10; Ersk. iii. 1, 12–15; Bell's Prin., ss. 543–554; see also Stair, i. 9, and G. Wallace, Principles, 1760.

PARTICULAR AUTHORITIES.—Roberts and Gibb, Collisions on Land; Findlay, Property Owners' and Occupiers' Liability, 1928; Philip, Motor Cars, 1929, chap. viii.; M'Millan, Scottish Maritime Practice, 1926, chap. iv.

ENGLISH AUTHORITIES.—Beven on Negligence; Pollock, Salmond, Underhill, etc., on Torts.

[1] Bell's Prin., ss. 543, 553 (1).

[2] See Glegg, p. 6; Guthrie Smith, pp. 4–5.

[3] iii. 1, 13.

The difference may be material in many ways. For instance a master is liable for his servant's negligence, but not for his malice.[1] A negligent act may, of course, be intentional, but in that case the intention is confined to the action and does not extend to the injury. It is the antecedent disregard of others which constitutes the fault, and that is merely carelessness. In England a distinction is drawn between misfeasance and non-feasance, and liability for the latter is materially restricted.[2] This distinction has no place in Scots law.[3]

525. Before there can be negligence there must be a duty which is (1) accepted by law, and (2) conceived in favour of the claimant, and there must be (3) failure to fulfil it. Although fault has been made out it does not involve any liability unless (1) *damnum* has resulted, which (2) is causally connected with the negligence, and (3) is not too remote. The definition and basis of negligence will be treated first, and then its three elements. Thereafter the extent and content of the duty of care will be discussed in detail, with special emphasis upon the quality of foresight, which gives rise to the doctrine of natural and probable consequence underlying the whole conception of duty. A discussion of the three constituents of liability will follow, and the two principal defences (contributory negligence and *volenti non fit injuria*) will next be noticed. Finally a section is added on onus of proof.

SUBSECTION (2).—*Definition.*

526. The word "negligence" may be used either as a general term of speech or as a technical term of law. In the popular sense it is the opposite of diligence,[4] and is roughly equivalent to carelessness or inadvertence.[5] According to the New English Dictionary it connotes "want of attention to what ought to be done or looked after; carelessness with regard to one's duty or business; lack of necessary or ordinary care in doing something." But in the legal sense it has a more restricted meaning, and may be shortly defined as "a breach of a legal duty [6] owed to someone [7] to exercise the legal standard of care [8] in the regulation of self, servants, and property." A well-known English definition,[9] which has found acceptance in Scotland,[10] is as follows: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Another and shorter one [11] puts it as "simply neglect of some care which we are bound by law to exercise towards somebody." In this article the word will always be used in its most limited and technical sense, but no doubt *per incuriam* that is not always done. For instance, it has often been said that negligence *per se* does not involve liability, unless there has been a breach of duty.[1] But *ex hypothesi* negligence presupposes duty, and thus the word is seen to have been used in its popular and not in its strict sense. A more accurate expression of the doctrine intended would be effected by saying that what is negligence towards A. is not necessarily negligence towards B.[2]

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[1] See, *e.g.*, *M'Laren* v. *Rae*, 1827, 4 Mur. 381.

[2] In questions of duty to licensees and by public authorities, see authorities in Glegg, pp. 63, 64, 326, and *infra*, para. 532.

[3] Glegg, p. 6; see para. 537, *infra*; cp. *Beckett* v. *Hutcheson*, 1866, 4 M. (H.L.) 6.

[4] Per Lord Chief Commr. Adam in *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 269.

[5] See Beven, p. 3.

[6] See para. 541, *infra*.

[7] See para. 545, *infra*.

[8] See para. 557, *infra*.

[9] Per Alderson B. in *Blyth* v. *Birmingham Water Works Co.*, 1856, 11 Ex. 781, at p. 784.

[10] Per Lords Dunedin and Kinnear in *Clelland* v. *Robb*, 1911 S.C. 253, at p. 256.

[11] Per Bowen L.J. in *Thomas* v. *Quartermaine*, 1887, 18 Q.B.D. 685, at p. 694.

527. Negligence is generally understood to be something other than wilful misconduct,[3] but one weighty dictum has been given to the contrary.[4] In this last view the term is co-extensive with fault, on the analogy of the Latin *culpa*. But as wilful misconduct is *culpa lata*, and as that is for most purposes equiparate to dole,[5] it is submitted that negligence cannot be so widely extended. Previous authority [6] and present understanding seem to support the doctrine that negligence is a more limited term than *culpa*.

SUBSECTION (3).—*Basis of* Culpa.

528. As will be explained under that head, the basis of all REPARATION in Scotland is *culpa*. Under the law of England there may be liability *ex damno* or *ex facto per quod damnum*, but not so in this country.[7] Even in regard to *opera manufacta*, which were looked on as risky innovations, the contrary principle of guarantee was rejected without any difficulty by the Scots Courts at an early date. Thus no one was ever here responsible for a stage coach,[8] a railway train,[9] or machinery,[10] without proof of fault, although this was perhaps somewhat too readily inferred.[11] The master's liability for his servant is not really an exception to this rule, as the servant's negligence is deemed to be the master's.[12] The general principle has been often affirmed by the House of Lords even before the time when express provision was made for the representation of Scotland in that tribunal. Thus in 1814 a defender was there exonerated because no *culpa* had been proved against him,[13] and in 1855 an interlocutor of the Court of Session was reversed upon the purely technical ground that it did not contain a finding of fault.[1] This was stressed by Lord President Inglis in resisting an attempt by some of his brethren to allow an exception in respect of damage caused by the condition of heritage.[2] As he pointed out, there is *ex hypothesi* no place in Scots law for any other basis of liability to make amends than *culpa*. The rule of *Rylands* v. *Fletcher* [3] was only accepted at the time here on the understanding that it was based upon fault.[4] It is necessary to stress this as there is a tendency to-day to assume that English cases, many of which are quite independent of fault, are authorities in this country.

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[1] Per Lord Dunedin in *Clelland* v. *Robb*, 1911 S.C. 253, at p. 256, and in *Bastable* v. *North British Rly. Co.*, 1912 S.C. 555; per Lord Kinnear in *Clelland*, *supra*, at p. 256, in *Black* v. *Fife Coal Co.*, 1912 S.C. (H.L.) 33, at p. 40, and in *Johnstone* v. *Mags. of Lochgelly*, 1913 S.C. 1078, at p. 1086; see also per Lord Esher in *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, at p. 497.

[2] See para. 545, *infra*.

[3] *Bastable* v. *North British Rly. Co.*, *supra*.

[4] Per Lord Pres. Dunedin in *Bastable*, *supra*, at p. 565.

[5] See para. 558, *infra*.

[6] See *Davie* v. *Wilson*, 1854, 16 D. 956.

[7] See para. 531, *infra*.

[8] *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 26; per Lords Meadowbank and Jeffrey in *Lyon* v. *Lamb*, 1838, 16 S. 1188, at pp. 1195, 1191.

[9] *Cargill* v. *Dundee and Perth Rly. Co.*, 1848, 11 D. 216.

[10] Per Lords Mackenzie and Jeffrey in *Sneddon* v. *Addie*, 1848, 11 D. 1159, at p. 1161; *Ovington* v. *M'Vicar*, 1864, 2 M. 1066; per Lord Chancellor Campbell in *Wemyss* v. *Mathieson*, 1861, 4 Macq. 215, at p. 221, and Lord Wensleydale at p. 227.

[11] See para. 610, *infra*.

[12] Cp. Glegg, p. 21.

[13] *Milne* v. *Smith*, 1814, 2 Dow 390.

529. It necessarily follows that there cannot, consistently with principle, be any liability arising solely out of (*a*) accident, or (*b*) ownership of property,[5] or (*c*) from the doctrine of "insurance." The last case falls naturally under REPARATION, but the others will be treated here. As to the first, legislation has made familiar the responsibility of an employer for almost any casualty which may befall a workman,[6] but such an idea is absolutely repugnant to the common law.[7] Thus Erskine [8] has it that "if what has brought on the damage be merely accidental, the person suffering has no remedy." Lord Glenlee [9] emphasised this in 1817 when he said, "I don't see how the common operations of life could go on otherwise, if a man could never do anything without risking his fortune from some accident that may happen." Professor Bell [10] does indeed suggest that in cases of inscrutable fault in collisions at sea there should be contribution, but there is no authority for this.[11]

530. A number of examples may be given of events which have been treated by the Scots Courts as pure accidents involving no liability to anyone. There are many in connection with animals, such as a horse shying,[12] bolting,[13] "reesting," [14] or stumbling;[15] a bull getting loose in a street;[1] a stray dog being shot without being seen;[2] a mouse creeping into an empty ginger-beer bottle;[3] or beasts being injured while grazing[4] or being driven.[5] Instances affecting property are also common, such as a bolt falling down a mine shaft,[6] iron snapping through crystallisation,[7] a plank giving way,[8] a hawser parting,[9] a pipe becoming choked,[10] a rickety wall falling through excavations near,[11] the lynch-pin of a wheel breaking,[12] or glass being precipitated into the street owing to the collapse of a window cord.[13] The intervention of nature is also reckoned as accident, although not amounting to *damnum fatale*, as for instance an extraordinary rainfall,[14] or the deflection by wind of a felled tree so as to crash into the highway.[15] Some human actions are in the same category, as when a railway passenger puts her head out of the window so far as to come in contact with a mail post,[16] or falls while climbing out of a carriage which is not at a platform;[17] a person is seized with sudden sickness;[18] or one young schoolboy jumps on to another young schoolboy's back.[19] Miscellaneous examples are a tin of salmon going bad,[20] a bus swerving into a wall.[21] There are many other cases in which the matter is less clear. If a squad of men are engaged in moving a heavy object and one is hurt in the process, this has been held to be merely an accident, unless there was some special circumstance, such as the task being obviously beyond their strength.[22] Thus also the collapse of scaffolding[23] or the explosion of naphtha[24] do not infer liability, unless the reason can be ascertained or inferred. In order to recover damages a pursuer must shew some fault which, as Lord Neaves[25] has put it, is "tangible and intelligible."

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[1] *Fleeming* v. *Orr*, 1855, 2 Macq. 14. They were precluded by statute from reviewing the findings of fact.

[2] *Laurent* v. *Lord Advocate*, 1869, 7 M. 607, at p. 610; *Campbell* v. *Kennedy*, 1864, 3 M. 121, at p. 126.

[3] 1866, 1 Ex. 265; 1868, L.R. 3 H.L. 330.

[4] *Chalmers* v. *Dixon*, 1876, 3 R. 461, per Lord Justice-Clerk Moncreiff and Lord Gifford at pp. 464, 468; cp. per Lord Robertson in *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381, at pp. 393, 394; Glegg, pp. 20, 21, 355, 356; Lord Ormidale in *Chalmers*, *supra*, at p. 466; and in *Wilsons* v. *Waddell*, 1876, 3 R. 288; see also Guthrie Smith, pp. 21, 199.

[5] See para. 531, *infra*.

[6] See MASTER AND SERVANT, Vol. IX. p. 492, *ante*, and WORKMEN'S COMPENSATION ACTS.

[7] See per Lord Chief Commr. Adam in *Gunn* v. *Gardiner*, 1820, 2 Mur. 194, at p. 199.

[8] iii. 1, 13; see also Bankt. i. 10, 40, 41.

[9] *Linwood* v. *Hathorn*, 14th May 1817, F.C., at p. 332.

[10] Com. i. 581.

[11] See M'Millan, Scottish Maritime Practice, p. 170; *The "Olympic"* v. *H.M.S. "Hawke,"* [1913] P. 214.

[12] *Gibson* v. *Stewart*, 1894, 21 R. 437.

[13] *Shaws* v. *Croall & Sons*, 1885, 12 R. 1186; but if there is *culpa*, of course, it is otherwise; see *Milne & Co.* v. *Nimmo*, 1898, 25 R. 1150, and cases there cited, and *Snee* v. *Durkie*, 1903, 6 F. 42.

[14] *Watson* v. *Wordie & Co.*, 1906, 8 F. 876.

[15] *Bell* v. *Caledonian Rly. Co.*, 1902, 4 F. 431; *Snee* v. *Durkie*, *supra*.

531. In the same way there can be no liability in Scotland arising simply out of the ownership of property.[26] In Lord President Inglis's time a small minority of judges [1] favoured the view that a heritor might in certain circumstances have to make good damage caused by defects in subjects owned by him, even apart from fault. But his Lordship [2] succeeded in maintaining the absolute generality of the rule that only *damnum culpa datum* can compel reparation. There is no single decision standing in the books [3] imposing liability upon a defender simply because he was proprietor. Thus Lord Neaves remarked [4] that "there are obligations which arise *ex contractu*, and *quasi ex contractu*, and *ex delicto*, and *quasi ex delicto*, but I never heard of an obligation arising merely *ex dominio*." Although the authority to this effect is now overwhelming,[5] the contrary has been advanced as a basis of responsibility as recently as 1928,[6] and the argument, though disregarded, may seem perhaps not to have been rejected with sufficient emphasis.[7] The test of culpability in these cases is whether there was possession and control.[8]

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[1] *Harpers* v. *Great North of Scotland Rly. Co.*, 1886, 13 R. 1139.

[2] *Davie* v. *Wilson*, 1854, 16 D. 955.

[3] *Mullen* v. *Barr & Co.*, 1929 S.C. 461.

[4] *Sutherland* v. *Hutton*, 1896, 23 R. 718.

[5] *Herriot* v. *Unthank*, 1827, 6 S. 211; cf. *Thompson* v. *North British Rly. Co.*, 1882, 9 R. 1101.

[6] *Paterson* v. *Monkland Iron Co.*, 1851, 13 D. 1270.

[7] *Milne* v. *Townsend*, 1892, 19 R. 830.

[8] *Paterson* v. *Kidd's Trs.*, 1894, 24 R. 99.

[9] *New Steam Tug Co.* v. *M'Clew*, 1869, 7 R. 733.

[10] *Hampton* v. *Galloway & Sykes*, 1899, 1 F. 501, see p. 508; *North British Storage Co.* v. *Steel's Trs.*, 1920 S.C. 194, at p. 202.

[11] *Campbell's Trs.* v. *Henderson*, 1884, 11 R. 520.

[12] *Lyon* v. *Lamb*, 1838, 16 S. 1188.

[13] *Robinson* v. *Reid's Trs.*, 1900, 2 F. 928.

[14] *Kidston* v. *Caledonian Rly. Co.*, 1894, 31 S.L.R. 564.

[15] *Linwood* v. *Hathorn*, 14th May 1817, F.C.; 1821, 2 Sh. App. 20.

[16] *Pirie* v. *Caledonian Rly. Co.*, 1890, 17 R. 1157.

[17] *Abbot* v. *North British Rly. Co.*, 1916 S.C. 306.

[18] Per Lord Justice-Clerk Moncreiff in *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149, at p. 154.

[19] *Gow* v. *Glasgow Education Authority*, 1922 S.C. 260.

[20] *Gordon* v. *M'Hardy*, 1903, 6 F. 210.

[21] *Henderson* v. *Mair*, 1928 S.C. 1.

[22] *M'Manus* v. *Hay*, 1882, 9 R. 425; *Brown* v. *Furnival & Co.*, 1896, 23 R. 492.

[23] *Wilson* v. *Love*, 1897, 25 R. 280.

[24] *Howie* v. *Ailsa Shipbuilding Co., Ltd.*, 1912 S.C. 1225.

[25] *King* v. *Pollock*, 1874, 2 R. 42, at p. 44.

[26] *Campbell* v. *Kennedy*, 1864, 3 M. 121; *Laurent* v. *Lord Advocate*, 1869, 7 M. 607; *Moffat & Co.* v. *Park*, 1877, 5 R. 13; *Edinburgh Rly. Access Co.* v. *Ritchie & Co.*, 1903, 5 F. 299.

SUBSECTION (4).—*English Law Contrasted.*

532. The fundamental difference between the basis of REPARATION in England and in Scotland will be treated under that head. It is often assumed that in the limited sphere of negligence there is not and never has been any difference. This is a mistake. It was in an action based on negligence that Lord Kinloch pointed the contrast in 1864.[9] It was proposed to give redress to a master for injury to his servant on the model of the English remedy *per quod servitium amisit.*[10] In his Lordship's view,[9] however, "the authorities shew that the matter of damages

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[1] Lord Cowan in *Campbell* v. *Kennedy*, 1864, 3 M. 121; Lords Ardmillan, Deas, and Kinloch in *Laurent* v. *Lord Advocate*, 1869, 7 M. 607; Lord Justice-Clerk Moncreiff in *Moffat & Co.* v. *Park*, 1877, 5 R. 13.

[2] See *Laurent*, *supra*, at p. 610; *Campbell*, *supra*, at p. 126.

[3] The apparent exception of *Cleghorn* v. *Taylor*, 1856, 18 D. 664, was explained by Lord Pres. Inglis in *Campbell*, *supra*, at p. 126, and two earlier cases by Lord Pres. M'Neill in *M'Intosh* v. *Scott & Co.*, 1859, 21 D. 363, at p. 368.

[4] *Campbell*, *supra*, at p. 125.

[5] See dicta to same effect per Lord Gifford in *Pirie & Sons* v. *Mags. of Aberdeen*, 1871, 9 M. 412, at p. 413, and in *Moffat & Co.*, *supra*, at p. 17; Lord Lee in *Ross* v. *Keith*, 1888, 16 R. 86, at p. 91; Lord Trayner in *M'Gee* v. *Anderson*, 1895, 22 R. 274, at p. 277, and in *Snee* v. *Durkie*, 1903, 6 F. 42, at p. 46; Lord Johnston in *Wolfson* v. *Forrester*, 1910 S.C. 675, at p. 682; Lord Mackenzie in *Kennedy* v. *Shotts Iron Co.*, 1913 S.C. 1149, at p. 1151; Lord Cullen in *M'Murray* v. *School Board of Glasgow*, 1916 S.C. 9, at p. 12; Lord Hunter in *Boyd* v. *Glasgow Iron and Steel Co.*, 1923 S.C. 758, at p. 765; and Lord Anderson in *Henderson* v. *Mair*, 1928 S.C. 1, at p. 8.

[6] *Henderson*, *supra*.

[7] It was negatived by Lord Dunedin in *Oliver* v. *Saddler & Co.*, 1929 S.C. (H.L.) 94, at p. 103. The only dicta to the contrary effect seem to be per Lord Glenlee in *Baird* v. *Hamilton*, 1826, 4 S. 790, at p. 791; Lord Pres. Boyle in *Hislop* v. *Durham*, 1842, 4 D. 1168, at p. 1170 (disapproved by Lord Pres. Inglis in *Prentices* v. *Assets* Co., 1890, 17 R. 484, at p. 488); see also Lord Kinnear in *Devlin* v. *Jeffray's Trs.*, 1902, 5 F. 130, at p. 134.

[8] *Milne* v. *Smith*, 8th March 1810, F.C.; 1814, 2 Dow 390; *Maclachlan* v. *Road Trs.*, 1827, 4 Mur. 216; *Shiells* v. *Edinburgh and Glasgow Rly Co.*, 1856, 18 D. 119; *Kerr* v. *Mags. of Stirling*, 1858, 21 D. 169; *Clarke* v. *Scott*, 1896, 23 R. 442; *Laurie* v. *Aberdeen Mags.*, 1911 S.C. 1226.

[9] *Allan* v. *Barclay*, 1864, 2 M. 873, at p. 874; the contrast is also well illustrated by the rubric in *Paterson* v. *Wallace & Co.*, 1854, 1 Macq. 748.

[10] See *Rosses* v. *Bhagvat Sinhjee*, 1891, 19 R. 31; *Admiralty Commissioners* v. *S.S.* "*Amerika*," [1917] A.C. 38.

[the old-fashioned name for reparation [1]] is one of the points in which there are essential differences between the two systems of jurisprudence," and he proceeded to dismiss the action on this assumption. The Court adhered. According to an earlier authority,[2] however, English rules may be adopted if "they are the dictates of common sense."

533. The truth is that in origin, in development, and in many particulars even at the present day the two stand far apart. Scotland already had its law of negligence, based upon the *Lex Aquilia*,[3] when the Court was remodelled in 1532, whereas England had to wait three centuries for hers.[4] As in other branches, Scots law was more elastic than English because it was less restricted by technical forms of action (*e.g.* of trespass), and so its scope was wider and its advance more regular. History shews that the archaic doctrine of the Anglo-Saxons, well recognised by Hale,[5] that a man acts at his peril and is responsible *ex facto per quod damnum*,[6] was gradually modified by the idea that he was only responsible for "such consequences as bear some sort of relation to the act." [7] Liability essentially dependent upon *culpa* is a modern conception in that country.[6] A conservative Lord Chancellor stated the rule of inevitable liability *ex damno* as still good law in 1868.[8] Even in 1891 it was possible to argue there that trespass to the person might be actionable without fault.[9] At the present day there are cases in which trespass to goods inevitably involves reparation even if *culpa* is expressly negatived. Animals [10] and fire [11] are the most obvious examples.

534. The not unnatural persistence of the older doctrines in the minds of judges [12] as well as of commentators [13] makes the indiscriminate citation of English authority in the Scots Courts a practice to be deprecated. The extent to which alien writers have been quoted in this branch of the law is very remarkable. In several instances the passages adopted have been so misunderstood that they have produced results which are strange to both laws, and which would certainly have astonished the authors.[1] There is undoubtedly a sufficient body of native material to enable the subject to be adequately treated without any great recourse to foreign sources, and this is the method here adopted. The law of Scotland was originally based upon principles, which were applied from early times consistently and universally, and it still possesses these advantages, except in so far as foreign ideas have been imported into it from England. In that country, as Lord Dunedin [2] has pointed out, the right was limited by the remedy, and the result has been to produce a system of liability which is not self-consistent, and which is not based exclusively on *culpa*. While the Scots law of negligence has always consisted of a body of principles tempered by equity (*e.g.* in favour of trespassers [3] and servants [4]), its English counterpart seems originally to have been a collection of miscellaneous rights extracted from particular forms of process, which was moulded into some sort of a system by the rigorous application of principle during the last century.

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[1] *E.g.* the first edition of Mr. Guthrie Smith's work was entitled "Damages," the second "Reparation."

[2] Per Lord Chief Commr. Adam in *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 269.

[3] Ersk. iii. 1, 14; Bankt. i. 10, 40, 41; Guthrie Smith, p. 23.

[4] Law Quarterly Review, 1926, xlii. 184, cited in Pollock on Torts, p. 451.

[5] Pleas of the Crown, i. 15, 16.

[6] Holdsworth, History of English Law, iii. 375, viii. 446, 447; Holmes, Common Law, pp. 18–24.

[7] See Prof. Beale in Selected Essays in Law of Tort, p. 734.

[8] Lord Cranworth in *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330, at p. 340.

[9] *Stanley* v. *Powell*, [1891] 1 Q.B. 86.

[10] See, *e.g.*, *Ellis* v. *Loftus Iron Co.*, 1874, L.R. 10 C.P. 10; *Wellaway* v. *Courtier*, [1918] 1 K.B. 200, at p. 202; also per Williams J. in *Cox* v. *Burbidge*, 1863, 13 C.B. N.S. 430; *Rylands, supra*, 1866, 1 Ex. 265, at pp. 280–282, approved in H.L. at p. 340; Beven, p. 639; Charlesworth, Law of Dangerous Things, pp. 76, 81, 84.

[11] *Turberville* v. *Stamp*, 1697, 1 Lord Raym. 264; per Bankes J. in *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43, at p. 46; see also Charlesworth, p. 121; this was pointed out by Lord Pres. Inglis in *Mackintosh* v. *Mackintosh*, 1864, 2 M. 1357, at p. 1364, but it has not, as his Lordship thought, now been "blotted out by statute"; see Beven, p. 622; *Musgrove, supra*; *Shaw & Co.* v. *Symmons & Sons*, [1917] 1 K.B. 799.

[12] See, *e.g.*, per Kelly C.B. in *Smith* v. *London and South-Western Rly Co.*, 1870, L.R. 6 C.P. 14; commented on in Cambridge Legal Essays, 1926, p. 109.

[13] See, *e.g.*, Beven, pp. 20, 21, 707, 710.

SUBSECTION (5).—*Sources of Duty.*

535. Duties may arise either from contract or from circumstances, but there is a third source which is so special as to deserve mention, namely office.[5] Claims for breach of ministerial duty, as for instance against clerks of Court, sheriff officers, and keepers of public registers, are now rare, but historically this was one of the first cases in which an action for *damnum culpa datum* was allowed in Scotland. An obligation to be careful may thus take its origin either *ex contractu*, *ex factis et rebus*, or *ex officio*. These paragraphs are mainly concerned with the second class, but the others will be dealt with incidentally. Stair grouped together as obediential all duties not arising from contract,[6] and this classification has been adopted by Lord President Inglis.[7] But the distinction above indicated is material because it seems that there is now no duty apart from contract or office to avoid financial injury.[8] The existence of a contract between parties does not, of course, displace any of the ordinary rules of law affecting fault.[9] But slightly different considerations apply as to remoteness of damage when the duty arises *ex contractu* as opposed to *ex delicto*.[10]

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[1] Two examples are *Auld* v. *Barony Parish*, 1897, 5 S.L.T. 3 (see *infra*, para. 537, note 13); and *Davidson* v. *Aberdeen Mags.*, 1919, S.L.T. 213 (see *infra*, para. 575).

[2] Introduction to Vol. I. p. vi., *ante*.

[3] See para. 546, *et seq.*, *infra*.

[4] See para. 594, *infra*.

[5] Lord Kames regarded these as arising from implied agreement; Equity, 4th ed., p. 238.

[6] i. 3, 2.

[7] In *Laurent* v. *Lord Advocate*, 1869, 7 M. 607, at p. 610; also in *Campbell* v. *Kennedy*, 1864, 3 M. 121, at p. 126; see also per Lord Johnston in *Kemp & Dougall* v. *Darngavil Co.*, 1909 S.C. 1314, at p. 1326.

[8] See para. 543, *infra*.

[9] Per Lord Pres. Inglis in *M'Naughton* v. *Caledonian Rly Co.*, 1858, 21 D. 160, at p. 163.

[10] See per Lord Pres. Dunedin in *Malone* v. *Cayzer, Irvine & Co.*, 1908 S.C. 479, at pp. 481, 482; Bowen L.J. in *Cobb* v. *Great Western Rly Co.*, 1895, 62 L.J. Q.B. 335, at p. 337.

536. Within the realm of delict duty may arise either from common law or statute. In the latter case it is always a question of construction whether breach is negligence. As a rule, however, a legislative provision is to be treated only as evidence and not as law.[1] In other words, it will not *per se* establish duty, although it will be a factor tending in that direction,[2] to be considered along with the other circumstances of the case.[3] Where a regulation is conceived to benefit a certain class of persons, any one of these may generally found upon it as a basis of duty;[4] but there are many exceptions, such as muirburn,[5] for instance. If it is in the general interest, members of the public cannot readily do so.[6] Another restriction is that no action will lie unless the *damnum* suffered is of the kind against which Parliament intended to provide.[7] An employer will more easily be held at fault in regard to statutory provisions laid directly upon him than in regard to those primarily affecting his officials.[8]

SUBSECTION (6).—*Exemptions from Liability.*

537. As a general rule every legal person is bound to answer for the consequences of his negligence.[9] A public authority in Scotland is subject to exactly the same liability as an individual,[10] unless it enjoys a special statutory protection,[11] except, of course, where it is acting in a judicial capacity.[12] In England, on the other hand, it is as a rule exempted from claims for mere non-feasance,[13] and altogether if another means of redress is given in a statute.[14] From the earliest times magistrates in this country have been held responsible for omission pure and simple,[15] and when it was sought to introduce the English principle in 1894 it was rejected without hesitation.[16] In the same case the Court of Session declined to apply the other rule as to construction to a remedy of a different nature.[1]

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[1] Per Lord Chief Commr. Adam in *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 267.

[2] In early times it may have tended the other way; see Bankt. i. 10, 45.

[3] Per Lord Dundas in *Pressley* v. *Burnett*, 1914 S.C. 874, at p. 879; *Macfarlane* v. *Colam*, 1908 S.C. 56; see also *M'Laren* v. *Rae*, 1827, 4 Mur. 381, at p. 384.

[4] See *Black* v. *Fife Coal Co.*, 1912 S.C. (H.L.) 33.

[5] See *Mackintosh* v. *Mackintosh*, 1864, 2 M. 1357.

[6] *Phillips* v. *British Hygienic Laundry*, [1923] 1 K.B. 539.

[7] *Gorris* v. *Scott*, 1874, L.R. 9 Ex. 125; see also *O'Brien* v. *Arbib & Co.*, 1907 S.C. 975.

[8] *Bett* v. *Dalmeny Oil Co.*, 1905, 7 F. 787; *Black*, *supra*; *Rodger* v. *Fife Coal Co.*, 1923 S.C. 108.

[9] *Ferguson* v. *Earl of Kinnoul*, 1842, 1 Bell's App. 662, per Lords Brougham, Cottenham, and Campbell at pp. 702, 719–721.

[10] *Ferguson*, *supra*, per Lord Chancellor Lyndhurst, Lords Brougham and Campbell at pp. 695, 703, 722; Bell's Prin., s. 553 (5).

[11] See ACTION, Vol. I. p. 96, *ante*, and next para.

[12] Beven, i. 380 ff.; see also on whole subject Juridical Review, 1902, xiv. 158.

[13] See *Ferguson*, *supra*, and Beven, i. 316; this has been applied in the Outer House to exclude *any* action of damages against a public body unless malice is averred—*Auld* v. *Barony Parish of Glasgow*, 1897, 5 S.L.T. 3. It is submitted that this decision is unsound.

[14] See, *e.g.*, *Robinson* v. *Mayor of Workington*, [1897] 1 Q.B. 619.

[15] *Innes* v. *Mags. of Edinburgh*, 1798, Mor. 13189; 6th February, F.C.; approved in *Ferguson* v. *Earl of Kinnoul*, 1842, 1 Bell's App., per Lord Chancellor Lyndhurst and Lord Cottenham at pp. 695, 718; *Dargie* v. *Mags. of Forfar*, 1855, 17 D. 730; *Maclachlan* v. *Road Trs.*, 1927, 4 Mur. 216.

[16] *Strachan* v. *Aberdeen County Council*, 1894, 21 R. 915; see Glegg, p. 326, also pp. 63, 64

538. According to Mr. Glegg, liability is not avoided by incapacity, as intention is not an element of negligence. Thus lunatics and minors might in his view be called as defenders.[2] But it is submitted that his reasoning is unsound and inconsistent with authority.[3] Unless a person has the capacity to appreciate that he is under a duty and that it has become operative, there can be no negligence on general principles.[4] Further, the standard of the reasonable man is wholly inappropriate. The only privilege allowed is on grounds of public policy, and is in favour of the Crown,[5] judges,[6] and counsel.[7] These can do no wrong. Also a husband and wife cannot sue each other *ex delicto*.[8] As such exemptions apply to cases of malice as well they will be treated under Reparation. It should be added, however, that the interests of the Crown cannot be prejudiced by the negligence of its officials.[9] This is a native Scots rule depending upon early statute.[10] All the other exemptions have probably been borrowed from England in the course of the last century. It was in fact the judicial incompetence of the Sheriffs which first gave rise to the action of redress for *damnum culpa datum* in Scotland. In early times damages were awarded against them and against the Crown.[11]

Subsection (7).—*Prescription of Liability.*

539. Certain limitations in point of time have been imposed by various statutes.[12] The most important of these relate to public authorities, and have the effect of putting them in a privileged position as compared with individuals. Thus under the Public Authorities Protection Act of 1893[13] one must sue within six months of the injury,[14] whenever there is "any alleged neglect or default in the execution of any such Act [of Parliament], [public] duty, or authority." Otherwise the action is not maintainable. There is an express exception of cases where some other period is prescribed in an Act applying to Scotland only.[1] The chief examples of such alternative [2] provisions are the limitations of two and three months contained respectively in the Public Health Act of 1897 [3] and the Poor Law Act of 1845.[4] But defenders may be barred by their actings from pleading these statutes,[5] and in any event they do not apply to proceedings which were *ultra vires*.[6] The Public Authorities Protection Act extends to certain individuals when they are acting in an official capacity, such as the commanding officers of regiments.[7] Under the Maritime Conventions Act of 1911 [8] all actions against a ship for loss and personal injury must be commenced within two years, but the Court has a discretion to extend the time on cause shewn,[9] and is bound to do so if there has been no reasonable opportunity before of arresting a foreign vessel.[10] The statutory limitations as to amount of damages exigible from a shipowner are dealt with under CARRIAGE BY SEA.[11]

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[1] This is in accordance with Ersk. iii. 1, 14; see also *Strachan* v. *Edinburgh Improvement Commissioners*, 1837, 15 S. 637; and *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915, at p. 927; cp. *Beckett* v. *Hutcheson*, 1866, 4 M. (H.L.) 6.

[2] Glegg, p. 93.

[3] See Beven, i. 38–40.

[4] See para. 556, *infra*; per Lord Justice-Clerk Moncreiff in *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149, at p. 153; also per Lord Justice-Clerk Macdonald in *Gibson* v. *Glasgow Police Commissioners*, 1893, 20 R. 466, at p. 469.

[5] See Crown, Vol. V. p. 335, para. 794; *Macgregor* v. *Lord Advocate*, 1921 S.C. 847; see also *Wilson* v. *Edinburgh Volunteers*, 1904, 7 F. 168.

[6] Glegg, pp. 170, 171.

[7] Per Lord Campbell in *Purves* v. *Landell*, 1845, 4 Bell's App. 46, at p. 61; see also *Batchelor* v. *Pattison*, 1876, 3 R. 914.

[8] *Harper* v. *Harper*, 1929 S.C. 220.

[9] *Lord Advocate* v. *Miller's Trs.*, 1884, 11 R. 1046; *Lord Advocate* v. *Duke of Hamilton*, 1891, 29 S.L.R. 213.

[10] 1600, c. 14; see Crown, *supra*, para. 796.

[11] See Crown, and more fully in Juridical Review, 1928, xl. 238.

[12] See Glegg, p. 90.

[13] 56 & 57 Vict. c. 61, s. 1.

[14] Not six months from the *damnum*—*Brownlie & Sons* v. *Mags. of Barrhead*, 1923 S.C. 915.

SECTION 2.—ELEMENTS OF NEGLIGENCE.

540. Carelessness *per se* is not sufficient to make negligence in law. To this end there must be also two things: first, an obligation to act or refrain from acting, which is both recognised by law and conceived in favour of the claimant; and second, failure to discharge that obligation according to the legal standard. An action may thus be defeated on the grounds either that there is no duty in law or to the pursuer, or that the duty has been fulfilled.

SUBSECTION (1).—*Legal Duty.*

(i) *Not Moral Duty.*

541. Breach of a moral or religious duty [12] is not negligence, as these duties are not legally enforceable unless among relations. Stair [13] classified them under the head of natural as opposed to civil. "Such," he says, are the "obligations of beneficence generally; and particularly of charity to the poor, assistance to those in hazard, and relief to the oppressed."

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[1] Sec. 3.

[2] *Montgomerie & Co.*, v. *Haddington Mags.*, 1908 S.C. 121; *Gilillan, infra.*

[3] 60 & 61 Vict. c. 38, s. 166; see *Duncan* v. *Mags. of Hamilton*, 1902, 5 F. 160, and *Baker* v. *Corporation of Glasgow*, 1916 S.C. 199.

[4] 8 & 9 Vict. c. 83, s. 86; see *M'Coll* v. *Babtie*, 1882, 9 R. 470.

[5] *M'Innes's Trs.* v. *Glasgow Corporation* (O.H.), 1908, 16 S.L.T. 224; *Burns* v. *Glasgow Corporation* (O.H.), 1917, 1 S.L.T. 301.

[6] *Gilillan* v. *Middle Ward District Committee of Lanark County Council* (O.H.), 1902, 9 S.L.T. 432.

[7] *Wilson* v. *Edinburgh Volunteers*, 1904, 7 F. 168; as to whether it covers individuals acting in their private capacity, see *Christie* v. *Glasgow Corporation*, 1899, 7 S.L.T. 27.

[8] 1 & 2 Geo. V. c. 57, s. 8.

[9] As to procedure, see *Doric Steamship Co.*, 1923 S.C. 593; and as to cause, *Essien* v. *Clan Line Steamers*, 1925 S.N. 75.

[10] *S.S.* "*Reresby*" v. *S.S.* "*Cobetas*" (O.H.), 1923, S.L.T. 492.

[11] See Vol. III. p. 26, *ante.*

[12] The contrast is pointed by Lord Sands in *Grieve* v. *Brown*, 1926 S.C. 787, at p. 791.

[13] i. 3, 5.

Thus no action lies for failure to save the life of another by intervention or warning,[1] or to help him in a difficulty,[2] nor for injuring his health by annoying and worrying him.[3] In the same way one is not bound to assist the dazed [4] or drunk [5] to a place of safety, or having done so to see that they do not return,[6] or to warm those benumbed with cold,[7] or, it appears, to protect one's tenants against bad drains.[8] On the other hand, if a person is so incapacitated that he cannot summon a doctor himself, anyone in a position of ascendancy over him is bound to provide attention for him. This has been applied by the Courts to master and servant,[9] captain and crew,[10] captain and deported lunatic,[11] and police and prisoner.[12] It should perhaps be noted that absence of a moral duty may absolve a party from contributory negligence.[13]

(ii) *Some Action Necessary.*

542. In the normal case no duty can arise from mere inaction.[14] Many apparent exceptions to this rule can be explained on the ground of antecedent action requiring subsequent correction, as where a man starts a machine and fails to stop it timeously. There is no reason why a heritor should not sit and watch his vermin [15] and his weeds [16] spoiling the next estate, so long as he does nothing to facilitate the harm. He is not bound to guard against what is naturally on his ground. The same rule seems to apply to game,[17] unless it has been accumulated to an unnatural extent.[18] But as soon as anyone buys an estate [19] and occupies it, or takes over the control of anything,[20] he does become liable for dangers which a reasonable inspection would have revealed. If, however, he merely tolerates something which may become harmful if abused by someone else, that is not fault, as was held in an action against a householder who was responsible for a door opening outwards into the street.[1] Magistrates are in a special position, and they do owe a duty of general supervision of public places and of removing dangers therefrom.[2] But it has been held that they are not obliged to take down an old house jutting out into the highway so as to constitute a menace to traffic.[3]

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[1] Per Lord Young in *Wilkinson* v. *Kinneil Cannel Co.*, 1897, 24 R. 1001, at p. 1005; see also per Swift J. in *Brandon* v. *Osborne, Garrett & Co.*, [1924] 1 K.B. 548, at p. 554.

[2] *Abbot* v. *North British Rly. Co.*, 1916 S.C. 306.

[3] *Pridie* v. *Dick*, 1857, 19 D. 287.

[4] *Cuthill* v. *North British Rly. Co.* (O.H.), 1908, 15 S.L.T. 785.

[5] *MacCormick* v. *Caledonian Rly. Co.*, 1904, 6 F. 362.

[6] *Sinnerton* v. *Merry & Cunninghame*, 1886, 13 R. 1012.

[7] *Mathieson* v. *Caledonian Rly. Co.*, 1903, 5 F. 511.

[8] *Cameron* v. *Young*, 1908 S.C. (H.L.) 7; see para. 545, *infra*.

[9] *Jeffray* v. *Donald* (O.H.), 1901, 9 S.L.T. 199.

[10] *Taylor* v. *Hill* (O.H.), 1900, 7 S.L.T. 318.

[11] *Mackenzie* v. *Allan Line Steamship Co.*, 1909, 2 S.L.T. 285; 1910, 1 S.L.T. 364; 1911, 1 S.L.T. 139.

[12] *Simpson* v. *Mags. of Dundee*, 1928 S.N. 30.

[13] Per Lord Young in *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118; and in *Wilkinson*, *supra*, at p. 1005, cp. Lord M'Laren at p. 1006.

[14] Glegg, p. 8; not even in nuisance, according to him, see pp. 362, 363.

[15] As to rabbits, see *Taylor* v. *Fraser*, 1904, and *Marshall* v. *Moncrieffe*, both rep. in 1912, S.L.T. 306; *Boulston*, 1597, 5 Co. Rep. 104*b*; followed, *inter alia*, by Bray J. in *Stearne* v. *Prentice Bros.*, [1919] 1 K.B. 394. As to rats, see per Lord Stormonth-Darling in *Anderson* v. *Watson*, 1894, 2 S.L.T. 295.

[16] Dig. vii. 1, 13, 2; *Giles* v. *Walker*, 1890, 24 Q.B.D. 656; but see criticism in Glegg, p. 363, note, and cp. *per curiam*, Balfour's Practicks, p. 680.

[17] Glegg, pp. 409 411; *Farrer* v. *Nelson*, 1885, 14 Q.B.D. 258; *Foley* v. *Berthoyd*, 37 L.L.T.R. 123.

[18] See Guthrie Smith, pp. 224–226.

[19] *Black* v. *Cadell*, 1804, Mor. 13905; 1812, 5 Pat. 567.

[20] See para. 531, *supra*.

(iii) *Physical and Financial Injury.*

543. It is generally supposed that the duty recognised in law of taking reasonable care is only directed to the protection of the persons and corporeal property of the general public.[4] But this is not quite accurate, as this limitation only applies to duty arising purely *ex factis et rebus.* In contradistinction to that which takes its origin *ex contractu* or *ex officio*,[5] such a duty does not extend to their patrimonial rights. Several results flow from this. First, people whose occupations involve physical contact with others must take far greater precautions than those whose operations are carried out on paper. A person in charge of a vehicle has many more duties in the sphere of negligence than one in charge of an office. Again, as a rule, professional men are not liable (apart from contract or office) if they are merely careless. Doctors are exceptions, as their actions affect persons rather than pockets.[6] But a law agent is not subject to claims by beneficiaries whom he has inexcusably omitted from a will,[7] nor is an architect bound to make good to a bondholder loss caused by inadvertent issue of an unjustified certificate of building operations.[8] On the other hand, the communication of the contents of documents is treated as an invasion of a direct proprietary right, and professional men have been held liable in damages for this.[9] In the same way, no one can sue for loss of his servant's services [10] or of his contract rights,[11] or interest in any business concern.[12] Such loss is too remote, and is excluded either because there is no duty to the pursuer [13] or because the damage is not recognised as such in law.[14]

544. There was some doubt in England at one time as to whether nervous shock afforded a ground of action, and in a Privy Council case in 1888 [15] it was decided that it did not. This has now been departed from altogether,[1] but it does not seem likely that Scots law at any time entertained such a notion.[2] The law of this country has always admitted civil [3] claims based solely upon mental distress caused by the death of a near relative.[4] Perhaps Erskine had fright in mind when he said that where "another suffers damage, or runs the hazard of it," there must be reparation.[5] Damages were certainly awarded in 1891 without any opposition [6] for nervous injury combined with physical impact (which, however, left no marks), and in 1897 an action for fright caused to a child by a lunatic was approved in the Outer House.[7] Since then there have been a number of cases in which reasonable apprehension for one's own safety has been held relevant to infer damages.[8] It is now trite law that nervous injury is just as much a wrong as physical injury, but it must, of course, be shewn to be the natural and probable result of the negligence averred.[9] It seems not even to be necessary that there should be imminent peril; reasonable apprehension of approaching peril has been held to be enough.[10] In England matters have been taken a stage further, and a claim is maintainable for shock due to mere apprehension for the safety of relatives.[11] Several judges have repudiated this doctrine in Scotland,[12] but the question is still open. There seems little doubt that seeing a stranger hurt would give no redress according to Scottish ideas,[13] though that is admitted to follow from the English decision.[14] It has been laid down here by three judges to two that where there is a good claim for personal apprehension, apprehension for a fiancé is relevant in aggravation of damages.[15] The standard, of course, is that of the normal healthy person, and not of the nervous wreck.[16]

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[1] *Evans* v. *Edinburgh Corporation*, 1916 S.C. (H.L.) 149.

[2] See para. 537, note 15, *supra* ; *M'Leod* v. *Mags. of St. Andrews*, 1924 S.C. 960.

[3] *Mackenzie* v. *Mags. of Musselburgh*, 1901, 3 F. 1023.

[4] Bell's Prin., s. 542.

[5] See para. 581, *infra.*

[6] *Edgar* v. *Lamont*, 1914 S.C. 277.

[7] *Robertson* v. *Fleming*, 1861, 4 Macq. 167 ; see also *Tully* v. *Ingram*, 1891, 19 R. 65.

[8] *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491.

[9] *Brown's Trs.* v. *Hay*, 1898, 25 R. 1112.

[10] *Allan* v. *Barclay*, 1864, 2 M. 873.

[11] *Reavis* v. *Clan Line Steamers*, 1925 S.C. 725 ; *Quinn* v. *Greenock and Port Glasgow Tramways Co.*, 1926 S.C. 544.

[12] *Quinn, supra.*

[13] *Reavis, supra*, per Lord Constable at p. 732.

[14] *Ibid.*, per Lord Pres. Clyde at pp. 740, 741.

[15] *Victorian Rlys. Commissioners* v. *Coultas*, 1888, 13 App. Cas. 222.

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[1] See Beven, p. 60 ff.; Glegg, p. 43.

[2] See, however, *Pridie* v. *Dick*, 1857, 19 D. 287. It was never definitely repudiated until Lord Stormonth-Darling in *Cooper* v. *Caledonian Rly. Co.*, 1902, 4 F. 880, at p. 882, and Lord Shaw in *Brown* v. *John Watson, Ltd.*, 1914 S.C. (H.L.) 44, at pp. 50, 51; but see per Lord Justice-Clerk Macdonald in *North British Rly. Co.* v. *Wood, infra*, at p. 29.

[3] There is no criminal responsibility, Macdonald, p. 126.

[4] See para. 581, *infra*.

[5] Ersk. iii. 1, 13.

[6] *North British Rly. Co.* v. *Wood*, 1891, 18 R. (H.L.) 27.

[7] *Auld* v. *Barony Parish* (O.H.), 1897, 5 S.L.T. 3.

[8] *Cooper* v. *Caledonian Rly. Co.*, 1902, 4 F. 880; *Wallace* v. *Kennedy* (O.H.), 1908, 16 S.L.T. 485; *Gilligan* v. *Robb*, 1910 S.C. 856; *Fowler* v. *North British Rly. Co.*, 1914 S.C. 866; *Brown* v. *Glasgow Corporation*, 1922 S.C. 527; *Walker* v. *Pitlochry Motor Co.*, 1929 S.N. 115.

[9] *Ross* v. *Glasgow Corporation*, 1919 S.C. 174; see also *Pridie* v. *Dick*, *supra*.

[10] *Brown*, *supra*; *Walker*, *supra*.

[11] *Hambrook* v. *Stokes*, [1925] 1 K.B. 141.

[12] Lord Ormidale in *Campbell* v. *James Henderson, Ltd.* (O.H.), 1915, 1 S.L.T. 419; Lord Hunter in *Brown, supra*, at p. 532; Lord Justice-Clerk Alness, Lords Ormidale and Anderson in *Currie, infra*, at pp. 545, 547, 548, 553.

[13] See Glegg, p. 40; this is in accordance with the analogy of actions for *solatium* being strictly confined to near relatives, see REPARATION.

[14] Per Atkin L.J. in *Hambrook, supra*, at p. 157.

[15] *Currie* v. *Wardrop*, 1927 S.C. 538.

[16] Per Lord Stormonth-Darling in *Cooper, supra*, at p. 882; Lord Pres. Strathclyde in *Ross, supra*, at p. 178; Lord Mackay in *Walker, supra*, at p. 116.

SUBSECTION (2).—*Duty to Claimant.*

545. Before anyone can found upon the carelessness of another he must shew there was a duty to be careful in relation to him.[1] This applies to statutory as well as to common law duties.[2] There is no such thing as an act which is inherently negligent in all circumstances.[3] In the same way, even though there may be obligations to the world at large, there may be none in a question with a particular class.[4] As a general rule no one can claim as an individual unless he was both (i) acting lawfully at the time of the accident,[5] and (ii) in a direct relationship with the defaulting party.[6] It is in this connection that it has been somewhat loosely said that negligence *per se* will not make liability, unless there has been first of all a breach of duty.[7] Strictly speaking, of course, negligence presupposes breach of duty. It is better to say that what is negligence towards A. is not always negligence towards B.[8] But where a person is claiming in two different capacities, an even greater refinement may be introduced. There may be a duty, it seems, to him in one capacity and not in the other.[9] The principal doctrine here involved has been deprecated recently as involving a "wide discrepancy between moral duty and legal duty";[10] but it has probably an equitable basis. Both the limitations stated seem to depend on the rule of natural and probable consequence, to be elaborated later.[11] In other words, the law holds that the presence of those acting illegally, or with whom there is no direct contact, is not to be anticipated,[12] and therefore injury to them is not a natural and probable consequence of the defender's actions,[13] for which he should be made responsible.

(i) *Acting Lawfully.*

546. The two most obvious examples of claimants who may fail to establish a duty towards themselves on the ground that they were *versans in illicito* are (1) trespassers and (2) those who are contributorily negligent.[1] Thus pursuers are excluded if they have been trying to force their way into [2] or out of [3] premises without permission, or along roads which have been closed,[4] or have been wilfully interfering with other people's property.[5] If, however, the defender should have known of the illegality and has not objected to it, he cannot found upon it.[6] This applies to *mala prohibita* as well as to *mala in se.* Contributory negligence will be treated separately later.[1]

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[1] See Glegg, p. 39; per Lord Kinnear in *Kemp & Dougall* v. *Darngavil Coal Co.*, 1909 S.C. 1314, at p. 1319.

[2] *Monklands Rly. Co.* v. *Waddell*, 1861, 23 D. 1167.

[3] See Glegg, p. 39.

[4] See, *e.g.*, per Lord Pres. Dunedin in *Reilly* v. *Greenfield Coal and Brick Co.*, 1909 S.C. 1328, at p. 1337.

[5] See para. 546, *infra.*

[6] See para. 550, *infra.*

[7] See para. 525, *supra.*

[8] See Glegg, p. 40.

[9] *Reavis* v. *Clan Line Steamers*, 1925 S.C. 725, at p. 732.

[10] Per Lord Sands in *Grieve* v. *Brown*, 1926 S.C. 787, at p. 191; and in *Dumbreck* v. *Addie & Sons' Collieries*, 1928 S.C. 547, at p. 557.

[11] See para. 571, *infra.*

[12] Per Lord Salvesen in *Howie* v. *Ailsa Shipbuilding Co.*, 1912 S.C. 1225, at p. 1229; per Lord Parmoor in *Taylor* v. *Dumbarton Tramways Co.*, 1918 S.C. (H.L.) 96, at p. 110; per Lord Pres. Clyde in *Dumbreck, supra*, at p. 554; per Lord Sands in *Oliver* v. *Saddler & Co.*, 1928 S.C. 608.

[13] Per Lord Ardmillan in *Lumsden* v. *Russell*, 1856, 18 D. 468, at p. 469; per Lord Justice-Clerk Hope in *Balfour* v. *Baird & Brown*, 1857, 20 D. 238, at p. 243; per Lord Ashmore in *Boyd* v. *Glasgow Iron and Steel Co.*, 1923 S.C. 758, at p. 759; see also per Lord Meadowbank in *King* v. *Laird*, 1833, 6 Sc. J. 42.

547. Trespassers cannot now maintain an action,[7] although until the present century the law was doubtful. The Scots Courts have all along been very reluctant to rule them out, either because of their unwillingness to divide the public into categories on the English model,[8] or on the view that the illegality contributed only remotely to the accident.[9] Thus in 1826 a glaring trespass was disregarded, except in mitigation of damages,[10] and for some time it was openly said that although trespass was a point against a pursuer it was not *per se* conclusive.[11] It was soon settled, however, that no claim could be entertained where there had been both trespass and wrongful interference with property by children [12] (which might or might not have amounted to contributory negligence). In 1871 an action was definitely thrown out on the ground of trespass,[13] but in the next year the Court refused to decide an extreme case on that basis.[14] Throughout the latter part of the century the question was avoided on the many occasions on which it was raised,[15] but in some cases at any rate it seems to have been assumed that there was a duty to the whole world to keep property reasonably safe.[16] Finally, in 1903, following a number of earlier dicta,[1] the English rule [2] was adopted.[3] But the old ideas still lingered on, and the Scots Courts tended to hold that the issue was, could the pursuer's presence be anticipated, and, if so, that there was a duty to him even if he was in trespass.[4] All this has now been swept away by a decision of the House of Lords in 1929,[5] where the authorities for the old Scots view were not even cited, and their Lordships were allowed to assume that the two laws had always been the same. Lord Kinnear's dictum [6] has now been definitely approved, that "when people come on the lands of others for their own purposes, they must take the lands as they find them, and if they are exposed to injury from unseen dangers, they must take care of themselves, and cannot throw any responsibility upon the persons on whose lands they have trespassed." But the House went even further in holding in effect that there is no duty at all within the sphere of negligence, although, of course, one must not injure trespassers intentionally or by gross recklessness.[7]

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[1] See para. 594, *infra* ; Guthrie Smith, p. 147, regards trespass as a variety of contributory negligence.

[2] *Thomson* v. *North British Rly. Co.*, 1882, 9 R. 1101, approved by Lord Dunedin in *Dumbreck, infra*, at p. 61.

[3] *Johnstone* v. *Stewart & Sons*, 1897, 25 R. 103.

[4] *Crombie* v. *Balfour*, 1834, M'F. 155.

[5] *Lumsden* and *Balfour, infra* ; per Lord Kinnear in *Kemp & Dougall* v. *Darngavil Coal Co.*, 1909 S.C. 1314, at p. 1321 ; see also per Lord Meadowbank in *King* v. *Laird*, 1833, 6 Sc. J. 42.

[6] *Gibb* v. *Crombie*, 1885, 12 R. 886 ; *Richardson* v. *Beattie*, 1923, S.L.T. 165, 440.

[7] *Dumbreck* v. *Robert Addie & Sons' Collieries*, 1929 S.C. (H.L.) 51.

[8] See para. 559, *infra* ; *Dumbreck, supra.*

[9] See per Lord Wood in *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160, at p. 167 ; see para. 597, *infra.*

[10] *Chapman* v. *Parlane*, 1825, 3 S. 585 ; followed in *Grieve* v. *Brown*, 1926 S.C. 787.

[11] *Hislop* v. *Durham*, 1842, 4 D. 1168 (but cp. *Prentices, infra*, at pp. 488 and 490); per Lord Ardmillan in *Lumsden, infra*, at p. 469 ; see also *Davidson* v. *Monkland Rly. Co.*, 1855, 17 D. 1038 ; *Brownlie* v. *Tennent*, 1854, 16 D. 998, at p. 1001.

[12] *Lumsden* v. *Russell*, 1856, 18 D. 468 ; *Balfour* v. *Baird & Brown*, 1857, 20 D. 638.

[13] *Ferguson* v. *Laidlaw*, 1871, 43 Sc. J. 305.

[14] *Galloway* v. *King*, 1872, 10 M. 788.

[15] *Morran* v. *Waddell*, 1883, 11 R. 44 ; *Sinnerton* v. *Merry & Cunninghame*, 1886, 13 R. 1012 ; *Forbes* v. *Aberdeen Harbour Commissioners*, 1888, 15 R. 323 ; *Prentices* v. *Assets Co.*, 1890, 17 R. 484 ; *Kelly* v. *Merry & Cunninghame*, 1890, 27 S.L.R. 410 ; *Haughton* v. *North British Rly. Co.*, 1892, 20 R. 113 ; *Paton* v. *United Alkali Co.*, 1894, 22 R. 13 ; *Messer* v. *Cranston & Co.*, 1897, 25 R. 7.

[16] *Ross* v. *Keith*, 1888, 16 R. 86.

548. A trespasser has been defined [8] as "he who goes on land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to." The clearest example is one who has been previously warned off.[9] Next comes the man who climbs over a wall,[10] or fence,[11] or parapet, or wades through water.[12] It is also trespass to gain admittance by bribing or over-persuading a watchman, whose duty it is to keep people out.[13] But a heritor is not bound to enclose his estate or employ a custodian in order to preserve his rights. He must, however, do something active to exclude the public. Thus a notice board is not enough *per se*, but if he turns strangers off whenever he has occasion to see them no licence can be inferred against him. He is not bound to take steps which are absolutely effectual to ensure isolation. The principle is that permission and not tolerance is in issue, though, of course, extreme tolerance may amount to permission.[1] Even after the Scots Courts had reluctantly decided that there was no duty to trespassers they continued to favour them by taking a very lax view of what constituted a trespasser. One would naturally think that the moment a man put his foot over the threshold or march he became a trespasser, at any rate if contact with other people's property was the basis of a claim of damages. But until the case of *Dumbreck* [2] in the House of Lords a very different view was held in this country. A slight trespass was not regarded as a trespass at all.[3] Thus where a visitor, instead of ringing the bell, stepped across the threshold of an open front door in order to knock and fell into a hole entirely within the private premises, she was awarded damages.[4]

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[1] Per Lords Shand and Adam in *Prentices* v. *Assets Co.*, 1890, 17 R. 484, at pp. 489 and 491; per Lord Justice-Clerk Moncreiff in *Kelly* v. *Merry & Cunninghame*, 1890, 27 S.L.R. 410, at pp. 413, 414; per Lords Adam and Kinnear in *Devlin*, *infra*, at pp. 133 and 135; per Lord Trayner in *Carson* v. *Mags. of Kirkcaldy*, 1902, 4 F. 18, at p. 23.

[2] See Beven, p. 202; per Lord Chancellor Hailsham in *Dumbreck*, *infra*, at p. 56.

[3] *Cummings* v. *Darngavil Coal Co.*, 1903, 5 F. 513; followed in *Allan* v. *Dunfermline District Committee*, 1908, 15 S.L.T. 410; *Macdonald* v. *Caldwell & Co.* (O.H.), 1914, 2 S.L.T. 335; *Edwards* v. *London, Midland and Scottish Rly. Co.*, 1928 S.C. 471; see also per Lord Salvesen in *Howie* v. *Ailsa Shipbuilding Co.*, 1912 S.C. 1225, at p. 1229, and Lord Anderson in *Boyd* v. *Glasgow Iron and Steel Co.*, 1923 S.C. 758, at p. 769.

[4] See, *e.g.*, *Grieve* v. *Brown*, 1926 S.C. 787; per Lord Sands in *Shillinglaw* v. *J. G. & R. Turner*, 1926 S.C. 807, at p. 820.

[5] *Dumbreck* v. *Robert Addie & Sons' Collieries*, 1929 S.C. (H.L.) 51.

[6] *Devlin* v. *Jeffray's Trs.*, 1902, 5 F. 130, at p. 135.

[7] Per Lord Chancellor Hailsham at p. 55, Lord Dunedin at p. 59, and Lord Buckmaster at p. 65.

[8] Per Lord Dunedin in *Dumbreck* v. *Robert Addie & Sons' Collieries*, 1929 S.C. (H.L.) 51, at p. 59.

[9] See *Sinnerton* v. *Merry & Cunninghame*, 1886, 13 R. 1012; per Lord Blackburn in *Dumbreck*, 1928 S.C. 547, at p. 565.

[10] *Edwards* v. *London, Midland and Scottish Rly Co.*, 1928 S.C. 471; per Lord Anderson in *Boyd* v. *Glasgow Iron and Steel Co.*, 1923 S.C. 758, at p. 769.

[11] See per Lord Pres. Clyde in *Dumbreck* v. *Robert Addie & Sons' Collieries*, 1928 S.C. 547, at p. 553.

[12] *Ferguson* v. *Laidlaw*, 1871, 43 Sc. J. 305.

[13] *Macdonald* v. *Caldwell & Co.*, 1914, 2 S.L.T. 335.

549. But this was not all. Scots judges went so far as to recognise a wide class of persons, who were what may be called "legitimate trespassers," as being in the words of Lord Young legitimately there though not necessarily having any legal right to be there.[5] If no moral blame could be imputed there was thus no trespass.[6] This doctrine, though it seems to have been sanctioned by Lord President Inglis,[7] has been challenged in Scotland,[8] and has now been repudiated expressly by both the Lord Chancellor (Hailsham) and Lord Dunedin.[9] In their view no one can be on private property without leave and yet not be a trespasser. Between the different categories of persons on land, it has now been said,[10] there is to be "an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories." It is submitted that this is the only satisfactory basis. Under the old law no one knew when he became a trespasser, and some judges went very far in extending the doctrine of the legitimate trespass.[11] Now everyone knows that as soon as he sets foot across the Rubicon he takes his life in his hand. It is difficult to appreciate the view that any trespass can be venial which involves a risk of injury, and unless there is such risk the proprietor is, of course, not bound to anticipate it and, therefore, free from *culpa*. Also trespass at its very lowest is negligence,[1] and there is no duty to anticipate it. There is, however, one case in which the old Scots rule is still maintained; a person who, or an animal [2] which, strays involuntarily a short distance [3] from a public highway is not a trespasser, and there is a duty to fence pitfalls in a question with him.[4]

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[1] Per Lord Dunedin in *Dumbreck* v. *Robert Addie & Sons' Collieries*, 1929 S.C. (H.L.) 51, at p. 60.

[2] 1929 S.C. (H.L.) 51.

[3] *Hamilton* v. *Hermand Oil Co.*, 1893, 20 R. 995; per Lord Justice-Clerk Scott-Dickson in *Ross* v. *M'Callum's Trs.*, 1922 S.C. 322, at p. 326; per Lord Sands in *Dumbreck* v. *Robert Addie & Sons' Collieries*, 1928 S.C. 547, at pp. 557, 558.

[4] *Grieve* v. *Brown*, 1926 S.C. 787, following apparently *Chapman* v. *Parlane*, 1825, 3 S. 585, which was, however, decided when trespass was no bar; cp. *M'Murray* v. *Glasgow School Board*, 1916 S.C. 9.

[5] *Messer* v. *Cranston & Co.*, 1897, 25 R. 7, at p. 9; followed by Lord Guthrie in *M'Call* v. *John Porter & Son*, 1909, 2 S.L.T. 407.

[6] For the final expression of this doctrine see per Lord Pres. Clyde in *Dumbreck*, *supra*, at pp. 555, 556, and authorities there cited.

[7] *Monklands Rly. Co.* v. *Waddell*, 1861, 23 D. 1167, at p. 1177.

[8] Per Lord Guthrie and Lord Justice-Clerk Macdonald in *Howie* v. *Ailsa Shipbuilding Co. Ltd.*, 1912 S.C. 1225, at pp. 1229, 1230.

[9] *Dumbreck*, *supra*, at pp. 55, 59.

[10] *Ibid.*, p. 59.

[11] See *Galloway* v. *King*, 1872, 10 M. 788, per Lord Deas at p. 792 and Lord Kinloch at p. 794.

(ii) *Direct* Nexus.

550. Difficult questions arise in determining whether or not there exists between a pursuer and a defender such a direct relationship as to infer a duty of care. If the *nexus* is too slight there is no duty, because the person responsible has no reason to anticipate that his actions will cause harm to the claimant. Such problems are most commonly raised when there is an undoubted obligation to one person, and a third party seeks to extend it in his own favour. Two different classes of case may be distinguished: (*a*) where the pursuer has been injured by property made available,[5] or goods sold,[6] through the agency of another, and (*b*) where he sues in his own right in respect of the death of another, however caused.[7] In the first instance there is an action in the person of the injured party if there was a direct relationship with him: in the second anyone may claim if his interest in the life of the deceased was not too remote. The former question is largely one of fact, and the latter of law. The general principle involved seems to be simply that of natural and probable consequence. If the injury complained of should have been in the reasonable contemplation of a sentient wrongdoer, then he is liable for it.

551. It is by no means easy to reconcile the recent Scots decisions as to the existence of a duty towards users of property, who have no direct relation with those responsible for its condition. There seems to be no distinction in principle between heritage and moveables in this respect.[8] The ruling principle was laid down by Lord Benholme with regard to licensees in buildings as follows.[9] "Whenever property is left . . . in such a state as to be dangerous to the public entitled to be there, the proprietor, or someone in his stead, must be answerable for the damage or injury which may thereby be occasioned." It was reiterated by Lord Kinnear in relation to invitees on railway wagons,[1] when he said that " the liability which attaches to the occupier . . . is to use reasonable care and diligence that persons who are expressly or by implication invited to use it in business in which both are interested shall not be exposed" to certain risks. In both these cases the rule was stated in perfectly general terms as applying wherever a third party came in contact with property which was the subject of a contract between two others. Scots law thus accepted the doctrine of general responsibility in such circumstances to anyone other than an interfering stranger. To state the proposition in its final and most developed form: wherever A., in virtue of a contract with B., submits A.'s property to a course of treatment, in the knowledge that in the normal course of events it will be used by C., he has as a rule a duty to C. to see that it is reasonably safe.[2] There is indeed no reason in principle for the restriction of a man's duties to the world merely because he has a contract with one individual. That is *jus tertii* to the man in the street and he should not be prejudiced by it.[3]

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[1] Per Lord Wood in *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160, at p. 167; see Guthrie Smith, p. 147.

[2] *Mack* v. *Allan*, 1832, 10 S. 349.

[3] To infer liability it must be substantially adjoining the way; per Lord Dunedin in *Holland* v. *Lanarkshire District Council*, 1909 S.C. 1142, at p. 1149; *Melville* v. *Renfrewshire County Council*, 1920 S.C. 61.

[4] *Black* v. *Cadell*, 1812, 5 Paton 567; per Lord Cockburn in *Neilson* v. *Rodger*, 1854, 16 D. 603; *Carson* v. *Mags. of Kirkcaldy*, 1901, 4 F. 18; per Martin B. in *Hardcastle* v. *South Yorks Rly.*, 1859, 28 L.J. Ex. 139; adopted by Lord Shand in *Prentices* v. *Assets Co.* 1890, 17 R. 484, at p. 489, and Lord Trayner in *Carson*, *supra*, at p. 23.

[5] See para. 551, *infra*. [6] See para. 554, *infra*. [7] See REPARATION.

[8] Per Lord Kinnear in *Kemp & Dougall* v. *Darngavil Coal Co.*, 1909 S.C. 1314, at pp. 1319 and 1322; per Lord Pres. Clyde in *Oliver* v. *Saddler & Co.*, 1928 S.C. 608, at p. 616.

[9] *M'Martin* v. *Hannay*, 1872, 10 R. 408, at p. 412.

552. In 1908, however, the House of Lords laid down in *Cameron* v. *Young* that a landlord owed no duty *ex delicto* to those persons with whom his contact was the closest possible, namely, the occupiers of a house let.[4] This decision was contrary to the doctrine hitherto accepted in Scotland, and followed upon a recent English decision [5] to the same effect. The Court of Session had reached the same result, but only upon the understanding that "this [was] a claim founded on breach of contract." [6] Liability *ex culpa* was apparently not stressed at that stage, but it was expressly rejected in the supreme tribunal. There was one Scottish decision directly contrary to the view of their Lordships of Appeal, which was cited to them,[7] and another, more recent, which does not appear to have been cited,[8] and a third in which the argument which prevailed in *Cameron* v. *Young* was not even advanced.[9] The result of the decision, in the words of a Scottish judge, has been to throw the whole law on this topic into confusion,[10] and to introduce into it a large body of English precedent which it is humbly thought should have been rigorously excluded. Lord Robertson, who gave the leading opinion, explained that the duties of a landlord were of an entirely different character according to whether his actions took effect inside or outside of a house let.[1] Those within the house, he stated, "have and can have no right to be there except by the licence of the owner, given by the owner, on certain terms, to the person with whom he chooses to contract." This reasoning would appear to be equally applicable to persons on a common stair, and it is well settled by decisions both before [2] and after [3] that there is a duty to them. In practice the Courts have regarded the decision of the House of Lords as one to be applied within the narrowest possible limits.

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[1] *Kemp & Dougall* v. *Darngavil Coal Co.*, 1909 S.C. 1314, at p. 1322.

[2] *Kemp & Dougall, supra*, per Lords Kinnear, Pearson, and Johnston; cf. per Lord Buckmaster in *Oliver* v. *Saddler & Co.*, 1929 S.C. (H.L.) 94, at p. 98.

[3] See per Lord Pres. Inglis in *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160, at p. 163.

[4] *Cameron* v. *Young*, 1908 S.C. (H.L.) 7.

[5] *Cavalier* v. *Pope*, [1906] A.C. 428.

[6] 1907 S.C. 475, per Lord M'Laren at p. 481; per Lord Kinnear at p. 483 is to the same effect; the case was so explained in *Kennedy, infra*.

[7] *Hall* v. *Hubner*, 1897, 24 R. 875; see also per Lord Gillies in *Scott* v. *Tait*, 1826, 4 Mur. 57, at p. 61.

[8] *Kennedy* v. *Bruce*, 1907 S.C. 845.

[9] *Shields* v. *Dalziel*, 1897, 24 R. 849.

[10] See per Lord Sands in *Shillinglaw* v. *J. G. & R. Turner*, 1925 S.C. 807, at p. 820.

553. Cases which relate to plant are somewhat special. In general the character and closeness of the relationship are, as before, the determining factors,[4] but the following modifications of the rule of liability seem to be indicated. There is no duty if there is introduced into the operations a new adventure, in which A. is not directly concerned (though from the point of view of business efficiency he has an interest in it), and which involves a new risk [5] or further exposure to an old risk.[6] In other words, wherever injury to C. is a natural and probable consequence of A.'s carelessness, there is a duty, unless the need for anticipation is excluded by a *novus actus interveniens.* There is, however, an exception to this exception. Even where such a new adventure has been embarked upon,[7] there is a duty, it seems, if A. knows of it, and knows also either (*a*) that it is not reasonably practicable for B. to make an independent examination of the plant,[8] or (*b*) that it is an operation involving danger.[9] It is not clear whether these rules are restricted to cases where the initial relationship between A. and B. is one of contract.

554. Very similar questions are raised where property has actually passed from its original owner, as for instance where goods are purchased through a retailer, and the purchaser claims from the manufacturer. An exactly opposite rule to that stated above has been adopted in England in this branch of the law, namely. that in general there is no duty. In a recent case this has been followed by two Scots judges,[10] and applied to the sale of aerated waters in an unfit state for consumption. On appeal being taken to the House of Lords the manufacturers paid the claims in full. The effect, of course, is to leave standing in the books a decision in their favour, which, however, has been the subject of some criticism. Certain exceptions to the rule of exemption are admitted in England, such as (1) things dangerous *per se*,[11] (2) things known to be in fact dangerous,[1] and (3) fraud.[2] There is one case which seems rather to support a fourth occasion of liability,[3] namely where the article supplied is such that carelessness on the part of the maker must inevitably result in damage. It is submitted that unwholesome foodstuffs are a subject of liability, and that it was just such an instance which prompted Lord Dunedin's careful reservation [4] that "there may be, however, in the case of any one performing an operation . . . a relationship of duty."

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[1] At p. 9.

[2] *M'Martin* v. *Hannay*, 1872, 10 R. 408; *Fulton* v. *Anderson*, 1884, 22 S.L.R. 100; see also *Webster* v. *Brown*, 1892, 19 R. 765, in which the contrary was not argued.

[3] *Kennedy* v. *Shotts Iron Co.*, 1913 S.C. 1143.

[4] Per Lord Pres. Clyde in *Oliver* v. *Saddler & Co.*, 1928 S.C. 608, at p. 613.

[5] *Kemp & Dougall* v. *Darngavil Coal Co.*, 1909 S.C. 1314.

[6] *Caledonian Rly. Co.* v. *Warwick*, 1897, 25 R. (H.L.) 1.

[7] *Oliver* v. *Saddler & Co.*, 1929 S.C. (H.L.) 94.

[8] Per Lords Buckmaster and Atkin.

[9] Per Lords Atkin and Dunedin. Lord Shaw concurred with Lord Atkin, so that each ground of judgment appears to have received three votes. Lord Dunedin, however, reached his conclusion with considerable hesitation.

[10] *Mullen* v. *Barr & Co.*, 1929 S.C. 461, per Lords Ormidale and Anderson.

[11] *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640.

Subsection (3).—*Failure in Duty.*

555. Only a certain limited standard is required by law in the fulfilment of a duty of care owed to an injured party. Thus in order to qualify for damages a pursuer must specifically aver what the defender ought to have done and did not do.[5] Due discharge of duty is obviously a question so dependent on the circumstances of each particular case that few general principles can be stated. From time to time, however, the Court does intervene to define as a matter of law the *genus* of duty, though the *species* must always be left to the jury. Thus, for example, one is not bound to warn if a danger is in fact observed,[6] and notice is no defence if attention to it will not enable people to avoid the danger [7] (*e.g.* "beware of the dog"). But even such decisions are best considered in relation to the particular breach of duty complained of, and space does not permit of the subject being here treated on these lines.

556. There seem to be two exceptions of general application to the rule that duty must be fulfilled. A defender will be excused if it is impossible either (1) to appreciate that his duty has become operative, or (2) to discharge it. Instances of the former are uncommon, but they include cases in which a person is excusably ignorant of the fact that he is dealing with substances which are poisonous [8] or explosive.[9] Another example occurred in 1920,[10] when the master of a vessel was exonerated from blame in respect of a collision due to his anchor dragging, because owing to extreme weather conditions he could not tell that he was losing position. It is probably for this reason that a master is not liable at common law for a casual danger which emerges in the course of work, and of which he has no means of knowing.[11] Examples of impossibility of performance are more frequent. It is well recognised that *culpa caret qui scit sed prohibere non potest.* For instance, there is no fault if the means of making a ship seaworthy are absolutely unobtainable in a particular port,[1] or if there is no precaution by which a vessel's position can be maintained after a collision.[2] In the same way a tramway company is not to blame for failure to let down a sideguard after someone has been knocked down, as it is then too late to avoid injury.[3] Defenders have also been exonerated where the precaution suggested was not impossible, but involved illegal encroachment upon the property [4] or rights of third parties.[5]

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[1] *Farrant* v. *Barnes*, 1862, 11 C.B. N.S. 553.

[2] *Langridge* v. *Levy*, 1837, 2 M. & W. 519; 1838, 4 M. & W. 337.

[3] *George* v. *Skivington*, 1869, L.R. 5 Ex. 1; see also *Thomas* v. *Winchester*, 1852, 57 Amer. Dec. 455; 6 N.Y.R. 397; approved by Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, at p. 646, and in Pollock on Torts, pp. 514 and 523.

[4] *Dominion Natural Gas Co.* v. *Collins*, *supra*, at p. 646.

[5] *Gordon* v. *M'Hardy*, 1903, 6 F. 210; *Paterson* v. *Kidd's Trs.*, 1896, 24 R. 99.

[6] *Linwood* v. *Hathorn*, 14th May 1817, F.C. (see Lord Justice-Clerk Boyle, at p. 335); 1821, 2 Sh. App. 30.

[7] *Smillies* v. *Boyd*, 1886, 14 R. 150.

[8] *Cramb* v. *Caledonian Rly. Co.*, 1892, 19 R. 1054.

[9] *Galloway* v. *King*, 1872, 10 M. 788; *King* v. *Pollock*, 1874, 2 R. 42.

[10] *Cambo Shipping Co.* v. *Dampskibsselskabet Carl*, 1920 S.C. 26; see also per Lord Justice-Clerk Macdonald in *Gordon* v. *M'Hardy*, 1903, 6 F. 210.

[11] *M'Millan* v. *Barclay, Curle & Co.*, 1912 S.C. 263.

SECTION 3.—THE DUTY OF CARE.

SUBSECTION (1).—*In General.*

557. It is very difficult to indicate shortly the circumstances which normally give rise to duty.[6] Subject to the limitations imposed above,[7] the following tentative suggestion may be made. *Any person whose conduct is such that carelessness on his part would naturally involve appreciable risk of injury to the person or corporeal property of another who is not* versans in illicito, *and with whom he is brought directly into contact, is bound in law to take reasonable care to avoid such injury.* There are a number of points concerned in this proposition. "Conduct" is used as a neutral term intended to cover both action and such inaction as failure to give warning.[8] "Carelessness" is, of course, the essential basis of negligence.[9] If the accident is not " in the reasonable contemplation of anyone," [10] there is no duty to guard against it.[11] The word "appreciable" is inserted to suggest that "there must be fault of a tangible and intelligible description." [12] There may be a duty arising from contract or office to avoid financial injury as well as those indicated.[13] The requisites of lawful action [14] on the part of a pursuer and direct *nexus* [15] have been treated in the preceding paragraphs. It does not necessarily follow that if there is no direct contact there is no liability, but is is less easy to make out a case.

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[1] *Mackay* v. *M'Leod*, 1827, 4 Mur. 276, at p. 288.

[2] *S.S.* " *Baron Vernon* " v. *S.S.* " *Metagama*," 1928 S.C. (H.L.) 21, per Lord Haldane at p. 26.

[3] Per Lord Pres. Dunedin in *Gibb* v. *Edinburgh Tramways Co.*, 1913 S.C. 541, at p. 547.

[4] *Evans* v. *Mags. of Edinburgh*, 1916 S.C. (H.L.) 149; see also *Johnstone* v. *Mags. of Lochgelly*, 1913 S.C. 1078.

[5] *Livingstonia Steamship Co.* v. *Clyde Navigation Trs.*, 1928 S.C. 270.

[6] The well-known definition of Lord Esher in *Heaven* v. *Pender*, 1883, 11 Q.B.D. 503, at p. 509, is too wide; see per Lords Morison and Blackburn in *Oliver* v. *Saddler & Co.*, 1928 S.C. 608, at pp. 610 and 621, also 1929 S.C. (H.L.) 94.

[7] See para. 541, *supra.*

[8] See *Robertson* v. *Portpatrick and Wigtownshire Joint Line Committee*, 1919 S.C. 293.

[9] See para. 526, *supra.*

[10] Per Lord Justice-Clerk Macdonald in *Robinson* v. *Reid's Trs.*, 1900, 2 F. 928, at p. 939.

[11] See para. 571, *infra.*

[12] Per Lord Neaves in *King* v. *Pollock*, 1874, 2 R. 42, at p. 44.

[13] See para. 543, *supra.* [14] See para. 546, *supra.* [15] See para. 550, *supra.*

SUBSECTION (2).—*Degrees of Diligence.*

558. In the civil law three varying degrees of *culpa* were recognised —*lata, levis*, and *levissima*.[1] These were duly accepted in this country, but they have been mainly applied to different classes of contract. As regards delict, the distinction between *culpa levis* and *culpa levissima* has long since been abandoned,[2] and it is often said that there is now only one standard known to the law. This is not so in Scotland, though English judges may be justified in saying that for them "gross negligence" is merely ordinary negligence vituperated.[3] *Culpa lata* has always been regarded by the authorities in this country as (for some purposes at any rate) equiparate to dole,[4] and thus as quite distinct from negligence.[5] It was formerly considered that professional men were only liable for *crassa negligentia*,[6] and though it is commonly said that this is not so now,[7] the weight of authority as to law agents [8] in particular is in favour of the old standard,[9] which was enunciated by Lord Young as to doctors as late as 1901.[10] It was held in the Outer House in 1897 that a public body was not liable for ordinary negligence.[11] This is a complete misstatement of the law,[12] and was based upon a misinterpretation of an English textbook.[13] Only in the present century has it been settled that *culpa lata* is not relevant in aggravation of damages,[14] and is not introduced by the "agony rule." [15] There are still, however, a few cases in which one is not liable for ordinary negligence. For instance, trustees on a public charitable trust can only be mulcted in damages if they have been guilty of *culpa lata*.[16] But while "adjectival fault" is no longer in fashion,[1] such terms are still used in connection with indemnity clauses in deeds.[2] Thus testamentary trustees are only liable for *culpa lata* under the terms of an ordinary trust disposition and settlement.[3] It is safe to say, however, that apart from this there is only one standard, namely, that of reasonable care or ordinary *culpa*.

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[1] See Ersk. iii. 1, 21.

[2] Lord Mackenzie's Institute of Roman Law, 1862, 7th ed., p. 208; per Lords Neaves and Cowan in *Mackintosh* v. *Mackintosh*, 1864, 2 M. 1357, at pp. 1362, 1363; Glegg, p. 9. The term *culpa levissima* was, however, used as recently as 1925 by Lord Anderson in *Wernham* v. *M'Lean, Baird & Neilson*, 1925 S.C. 407, at p. 422.

[3] See Beven, p. 25 *et seq.*, and per Lord Johnston in *Hillcoat* v. *Glasgow and South-Western Rly. Co.*, 1908 S.C. 454, at p. 457.

[4] Stair, i. 13, 2 (cp. i. 9, 11); Ersk. iii. 1, 21; *Faulds* v. *Townsend*, 1861, 23 D. 437; per Lord Justice-Clerk Inglis in *Western Bank* v. *Douglas*, 1860, 22 D. 447, at pp. 476, 477; see also Beven, i. 36; Pollock, p. 455.

[5] See, *e.g.*, *Davie* v. *Wilson*, 1854, 16 D. 956. A contrary view was enunciated by Lord Dunedin in *Bastable* v. *North British Rly. Co.*, 1912 S.C. 555, at p. 565, but this was not shared by his colleagues, and seems inconsistent with his own previous opinion in *Black, infra.*

[6] *Purves* v. *Landell*, 1845, 17 Sc. J. 308; 4 Bell's App. 46.

[7] Glegg, p. 590 ff.; see also per Lord Shaw in *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21, at p. 30.

[8] *Miller's Trs.* v. *Polson*, 1897, 24 R. 1038; *Free Church of Scotland* v. *Macknight's Trs.*, 1916 S.C. 349.

[9] As to doctors, see *Farquhar, infra*; *Dickson* v. *Hygienic Institute*, 1910 S.C. 352; also Bell's Com. i. 489.

[10] *Farquhar* v. *Murray*, 1901, 3 F. 859, at p. 862.

[11] *Auld* v. *Barony Parish*, 1897, 5 S.L.T. 3.

[12] See, *e.g.*, *Dauney* v. *Maxwell*, 1836, 14 S. 1037.

[13] Beven, i. 316 relates only to the exercise of judicial functions.

[14] *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383, per Lords Shand and Adam at pp. 389, 391; *Black* v. *North British Rly. Co.*, 1908 S.C. 444.

[15] *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1927 S.C. 498, see per Lord Justice-Clerk Alness at p. 509, and 1928 S.C. (H.L.), per Lord Shaw at p. 30.

[16] *Andrews* v. *Ewart's Trs.*, 1886, 13 R. (H.L.) 69, at p. 73; Glegg, p. 569.

SUBSECTION (3).—*Standards of Care.*

559. There is no absolute standard or criterion of negligence.[4] By the old common law of Scotland the extent of a duty to take reasonable care always varied with the circumstances of each case. Negligence, it has been said,[5] must be construed "in reference to the matter under discussion. The question then is, whether that care, diligence, and attention which is applicable to the subject has been used." Most duties of this sort, as was pointed out recently,[6] "arise simply out of the relation into which the complexities of social life bring the defender with the pursuer. Those relations are infinitely various, and in Scotland we have been slow and unwilling to classify and categorise them." In England, on the other hand, the tendency has been to create certain sharply defined *species facti* in each of which a constant and invariable duty is owed.[7] In a recent decision,[8] the House of Lords applied these categories in a Scottish case. Notwithstanding that decision, it may still be said that duty is always a question of the particular circumstances of each case. From the point of view of forms of process this has been well expressed [6] by saying that here "every action founded on negligence and breach of duty is presented to the Court as an action 'on the case.'" There was never in Scotland any limited form of remedy such as the action of trespass [9] in England. Dallas [10] gives no styles because he says "als many subject matters, a necessity for als many forms."

560. In the same way the Scots Courts are very reluctant to make any statements of a general nature which may serve as guides to seekers after principle.[10] An action for injury by a cricket ball struck during a game in a neighbouring back garden may serve as an instance.[11] The judges refused to lay down [12] "as an abstract proposition that it [was] illegal to play cricket or bat-and-ball in a back-green or garden. One could, of course, quite well figure a case which might be stated where obviously the conditions and manner of play would be such as to infer damages for negligence." But it was not necessarily so. Mr. Beven, on the other hand, would have no difficulty in saying that as a general rule such an occupation was dangerous.[1] The decision is perhaps a narrow one. One of the few clear principles which seems to have successfully emerged from the welter of circumstances, is that there is no duty to protect a natural and obvious danger.[2]

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[1] *S.S. "Baron Vernon"* v. *S.S. "Metagama,"* 1927 S.C. 498, see per Lord Justice-Clerk Alness at p. 509.

[2] See, *e.g.*, *Bastable* v. *North British Rly. Co.*, 1912 S.C. 555.

[3] *Home* v. *Pringle*, 1841, 2 Rob. App. 384; *Seton* v. *Dawson*, 1841, 4 D. 310; *Knox* v. *Mackinnon*, 1888, 15 R. (H.L.) 83; *Raes* v. *Meek*, 1889, R. (H.L.) 31.

[4] See per Bramwell B. in *Degg* v. *Midland Rly. Co.*, 1857, 1 H. & N. 773, at p. 781.

[5] Per Lord Chief Commr. Adam in *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 269.

[6] Per Lord Pres. Clyde in *Shillinglaw* v. *J. G. & R. Turner*, 1915 S.C. 807, at p. 816; repeated in *Dumbreck* v. *Addie & Sons' Collieries*, 1928 S.C. 547, at p. 551.

[7] See Beven, i. 214, 215.

[8] *Dumbreck*, *supra*, 1929 S.C. (H.L.) 51.

[9] Styles, *s.v.* "Summonds of Damnage and Interest," 1697 ed., p. 331; 1774 ed., ii. 168.

[10] See, *e.g.*, per Lord Dunedin in *M'Kinlay* v. *Darngavil Coal Co.*, 1923 S.C. (H.L.) 34, at pp. 36, 37; *M'Kibbin* v. *Glasgow Corporation*, 1920 S.C. 590.

[11] *Ward* v. *Abraham*, 1910 S.C. 299.

[12] *Ibid.*, per Lord Dundas at p. 303.

561. It is possible, however, to tabulate a few of the principal factors affecting the extent of duty in any given case. The obligations of a defender vary according to (1) the relationship of the parties, which may be close, as to an invited guest, or distant, as to a member of the public;[3] (2) the instrument which has caused the damage;[4] (3) the age and capacity of the party injured;[5] (4) the status of the defender, as, for instance, whether he is an amateur or a professional;[6] (5) the customs of the time,[7] and perhaps of the class of person[8] affected; (6) the degree of danger involved in the nature of the operation;[9] (7) the use to which premises are put,[10] (8) and their previous history with regard to casualties.[11] Duty, however, does not depend on the capacity of the particular defender, for the standard is that of the ordinary man in all circumstances.[12] According to Stair,[13] a gratuitous agent acting under a special mandate[14] was an exception and was only bound to act as he would have done in his own affairs, but this has now been departed from.[15]

562. There is, however, one absolute criterion always applied in every case, and that is the test of the "prudent man." This is an ideal person who is not subject to any of the normal failings of human nature, and who exhibits all the characteristics of (1) forethought,[16] (2) judgment,[1] (3) skill,[2] (4) knowledge,[3] (5) intelligence,[4] and (6) foresight.[5] A successful defender must thus be somewhat of a paragon. It is no answer to a claim of damages to plead that he acted as he always was known to do and to the best of his ability, for the law has exacted an inexorable standard.[6] If it were otherwise infinite variety would be introduced, and proofs inordinately extended. As to premises, one is bound "to take such reasonable and ordinary precautions as would any prudent man to provide for the safety of himself, his family, and his servants." [7] The following well-known pronouncements were made with reference to acts essentially dangerous, namely, the use of fire and firearms, but there seems no reason to confine them to those *species facti*. As a general rule, according to Lord Neaves in 1864,[8] one "should exercise the care and diligence which a prudent man would observe in his own affairs, and which a prudent and conscientious man will observe as to the interests of his neighbours." Again, Lord Ormidale remarked in 1874: [9] "the most that can be expected is that [one] should use all the precautions incumbent on a prudent man, having due regard to the . . . nature of the instrument, and the safety of others." The same rule was negatively stated in the same case by Lord Neaves [10] when he considered necessary to liability "such neglect of the interests of others as a man of careful and conscientious mind would not allow if his own family were concerned." This is the standard which has been applied by the House of Lords in determining that the responsibility of trustees was to depend on what Lord Watson termed the "average standard," [11] which had been held to be "that degree of diligence which a man of ordinary prudence would exercise in the management of his own affairs." [12]

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[1] i. 117.

[2] Per Lord M'Laren in *Prentices* v. *Assets Co.*, 1890, 17 R. 484, at p. 493; cp. Lord Adam at p. 492; per Lord Salvesen in *Melville* v. *Renfrewshire County Council*, 1920 S.C. 61, at p. 66; per Lord Moncrieff in *Edwards* v. *London, Midland and Scottish Rly. Co.*, 1928 S.C. 471, at p. 474; per Lord Pres. Clyde in *Dumbreck* v. *Addie & Sons' Collieries*, 1928 S.C. 547, at p. 552; *Morrison* v. *London, Midland and Scottish Rly. Co.*, 1929 S.C. 1.

[3] See para. 578, *infra*.

[4] Per Lord Ormidale in *King* v. *Pollock*, 1874, 2 R. 42, at p. 44; per Lord Pres. Dunedin in *Reilly* v. *Greenfield Coal and Brick Co.*, 1909 S.C. 1328, at p. 1337, and Lord Pres. Clyde in *Dumbreck*, *supra*, at p. 552; as to animals, see *Gray* v. *North British Rly. Co.*, 1890, 18 R. 76, per Lords Adam and M'Laren at pp. 78, 79.

[5] Per Lord Justice-Clerk Moncreiff in *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149, at p. 153; per Lord Kinnear in *Johnstone* v. *Mags. of Lochgelly*, 1913 S.C. 1078, at p. 1089.

[6] See para. 568, *infra*.

[7] Per Lord Justice-Clerk Hope in *Kerr* v. *Earl of Orkney*, 1857, 20 D. 298, at p. 302; per Lord Justice-Clerk Alness in *Fraser* v. *Pate*, 1923 S.C. 748, at p. 753.

[8] *Dumbreck*, *supra*, per Lord Pres. Clyde at pp. 556, 557; cp. Lord Blackburn at p. 565.

[9] Per Lord Pres. Inglis in *Laurent* v. *Lord Advocate*, 1869, 7 M. 607, at pp. 610, 611; Lord Pres. Robertson in *Kidston* v. *Caledonian Rly. Co.* 1894, 31 S.L.R. 564, at p. 559.

[10] Per Lord M'Laren in *Paterson* v. *Kidd's Trs.*, 1896, 24 R. 99, at p. 104.

[11] *Cormack* v. *Dundee Harbour Trs.*, 1930, S.L.T. 229.

[12] Glegg, p. 12.

[13] Stair, i. 12, 10; Ersk. iii. 3, 36; see also Bell's Com. i. 516.

[14] So explained per Lord Watson in *Knox* v. *Mackinnon*, 1888, 15 R. (H.L.) 83, at p. 87.

[15] Bell's Prin., s. 218; Glegg, p. 12; *Copland* v. *Brogan*, 1916 S.C. 277.

[16] See para. 566, *infra*.

563. It should be emphasised, however, that the standard is not that of the superman,[13] and accordingly no one is liable for mere mistake. This has been developed mainly in connection with skilled occupations. For example, the master of a vessel is not bound always to do the right thing to avoid a collision or damage.[14] One "must not expect impossibilities." [15] In the same way much less is expected of an amateur than of a professional. Apart from these few general precepts some assistance may be had from an analysis of the Scots decisions, which seems to shew that the main qualities desiderated are those set out above,[1] which will be treated *seriatim.*[2]

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[1] See para. 567, *infra*. [2] See para. 568, *infra*. [3] See para. 569, *infra*.

[4] See para. 570, *infra*. [5] See paras. 571 *et seq.*, *infra*.

[6] Guthrie Smith, pp. 26, 27; see also *Vaughan* v. *Menlove*, 1837, 4 Scott 244; Pollock, p. 455.

[7] *Paterson* v. *Kidd's Trs.*, 1896, 24 R. 99, at p. 103, per Lord Adam; see also per Lord M'Laren at p. 104.

[8] *Mackintosh* v. *Mackintosh*, 1864, 2 M. 1357, at p. 1362.

[9] *King* v. *Pollock*, 1874, 2 R. 42, at p. 45. [10] *Ibid.*, at p. 44.

[11] *Knox* v. *Mackinnon*, 1888, 15 R. (H.L.) 83, at p. 87.

[12] *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31, at p. 34.

[13] See per Lord Shaw in *Laird Line* v. *U.S. Shipping Board*, 1924 S.C. (H.L.) 37, at p. 40.

[14] See, *e.g.*, Lord Low in *Boucker* v. *Aberdeen Fishing Co.*, 1910 S.C. 655, at p. 668, repeated by Lord Mackenzie in *Compagnie des Forges* v. *Gibson & Co.*, 1920 S.C. 247, at p. 274; see also *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21.

[15] Per Lord Pres. Strathclyde in *Compagnie des Forges*, *supra*, at p. 260.

Subsection (4).—*Defective Persons.*

564. Injury to a defective person, such as a child or one who is deaf or blind, raises special problems.[3] In considering whether there is any duty at all such questions are immaterial.[4] Thus if there is no obligation to the normal there can be none to the abnormal. An infant trespasser, for instance, is in no better position than an adult,[5] and there is no reason to fence a natural feature merely because children are likely to fall foul of it.[6] "But if a duty of care is once established, there may be a very material difference in the degree of care which is required for its due performance." [7] The responsibility of magistrates for the safe condition of the streets is, however, *sui generis*,[8] and they are bound to protect the blind from seen dangers, whereas there would be no duty in this respect to the general public.[9] It is doubtful whether this would extend to the inebriated,[10] and they do not seem to be obliged to keep the streets safe for children to play in.[11] An education authority, it has been stated, is under no higher obligation to children than a reasonable parent would be.[12]

565. It has been stated [13] as a general proposition that if a person who is under a duty of care "knows that those who are exposed to danger are helpless either from infancy or infirmity, he is bound to a proportionate degree of watchfulness." But there are, of course, exceptions; and a railway company "are not bound to adapt their regulations [as to level crossings] to the case of very young children, or of people who are deaf or blind, or otherwise incapable of taking care of themselves." [14] Applying the general principle, persons who drive vehicles in public streets,[15] or locomotives on private railways where they know children sometimes play,[16] must keep a look out for them. There is always a duty not to set traps for anybody, and breach of this must depend on the capacity of the injured party, as "obviously what is an allurement and a trap to a child is not so to an adult." [1] Liability has been imposed in the House of Lords for injury to children caused by a disused railway turntable,[2] and belladonna berries.[3] But an action is not relevant merely because it contains an averment of trap unless the Court thinks the averment is a fair one.[4]

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[1] See para. 562, *supra.*

[2] See paras. 566 *et seq.*, *infra.*

[3] See Glegg, p. 387; Guthrie Smith, pp. 143–145; Mr Beven discusses the whole subject under the head of contributory negligence, *quod vide.*

[4] Per Lord Kinnear in *Johnstone* v. *Mags. of Lochgelly*, 1913 S.C. 1078, at p. 1089; *M'Lelland* v. *Johnstone*, 1902, 4 F. 459; Beven, i. 198.

[5] Per Lord Dunedin in *Dumbreck* v. *Addie & Sons' Collieries*, 1929 S.C. (H.L.) 51, at p. 62.

[6] *Hastie* v. *Corporation of Edinburgh*, 1907 S.C. 1102; *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034.

[7] Per Lord Kinnear in *Johnstone*, *supra.*

[8] See para. 537, note 15.

[9] *M'Kibbin* v. *Corporation of Glasgow*, 1920 S.C. 590.

[10] See para. 541, *supra.*

[11] *Buchanan* v. *Glasgow Corporation*, 1923 S.C. 782.

[12] Per Lord Sands in *Gow* v. *Glasgow Education Authority*, 1922 S.C. 260, at p. 267.

[13] Per Lord Kinnear in *Johnstone*, *supra*; see also per Lord Pres. Inglis in *Morran* v. *Waddell*, 1883, 11 R. 44, at p. 46.

[14] Per Lord Kinloch in *Grant* v. *Caledonian Rly. Co.*, 1870, 9 M. 258, at p. 267; see also Lord Deas at p. 268, Lord Neaves at p. 270, and Lord Pres. Inglis at pp. 270, 271.

[15] *Clerk* v. *Petrie*, 1879, 6 R. 1076.

[16] *Morran*, *supra.*

SUBSECTION (5).—*Elements of Duty.*

(i) *Forethought.*

566. The first duty of the man who would avoid being negligent is that of thinking before he acts. If he once admits that he did not consider the risk he is out of court at once. "Failure to advert to a source of danger, which a prudent man would advert to and take into consideration, is negligence." [5] Also if the possibility of risk was present to his mind, and he did not trouble to make proper inquiry, he will be liable.[6] But this is not all, for though he has once thought he must still always remember in case the risk recurs.[7] Again, everyone must look before he leaps. Thus where a man in charge of a vehicle has any reason to suspect that children are about when he sets it in motion, he must see that they are out of the way.[8] In the same way, before heaving on a warp, one should take care that the decks are clear.[9]

(ii) *Judgment.*

567. The next requisite after forethought is judgment. The first rule is that where a certain course is clearly indicated it must be followed. There will be liability if "a duty which was reasonably plain was omitted to be discharged." [10] But the agent is entitled to a moment for consideration; thus if a ship's captain makes a wrong decision in a crisis, but corrects himself within three seconds, there is no negligence.[11] Secondly, no person is reckoned liable for error of judgment *per se*, provided that he has fairly applied his mind to the issue,[12] and in a technical matter taken the best expert opinion at the time available.[13]

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[1] Per Lord Dunedin in *Dumbreck* v. *Addie & Sons' Collieries*, 1929 S.C. (H.L.) 51, at p. 62; per Lord Kinnear in *Johnstone* v. *Mags. of Lochgelly*, 1913 S.C. 1078, at p. 1089.

[2] *Cooke* v. *Midland Great Western Rly. of Ireland*, [1909] A.C. 229.

[3] *Taylor* v. *Corporation of Glasgow*, 1922 S.C. (H.L.) 1.

[4] *M'Kenna* v. *Mags. of Coatbridge*, 1924 S.C. 356.

[5] Per Lord Kinnear in *Grant* v. *Wm. Baird & Co.*, 1903, 5 F. 459, at p. 463.

[6] *Gibb* v. *Crombie*, 1875, 2 R. 886.

[7] *Farquhar* v. *Murray*, 1901, 3 F. 859.

[8] *Morrison* v. *M'Ara*, 1896, 23 R. 564; *Taylor* v. *Dumbarton Tramways Co.*, 1918 S.C. (H.L.) 9.

[9] *Craig* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 736.

[10] Per Lord Phillimore in *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21, at p. 31; his Lordship's opinion was given independently of the "agony rule," see p. 32.

[11] *Laird Line* v. *U.S. Shipping Board*, 1924 S.C. (H.L.) 37.

[12] Per Lord Fraser in *S.S.* "*Toward*" v. *S.S.* "*Turkestan*," 1885, 13 R. 341, at p. 344; Lord Young in *Brown* v. *Furnival & Co*, 1896, 23 R. 492, at p. 495; per Lord Justice-Clerk Macdonald in *Wilson* v. *Love*, 1897, 25 R. 280, at p. 283.

[13] Per Lord Collins in *Clippens Oil Co.* v. *Edinburgh District Water Trs.*, 1907 S.C. (H.L.) 9, at p. 14; *S.S.* "*Baron Vernon*," *supra*; *S.S.* "*Toward*," *supra*.

But if he does this, appreciates that there is a risk in a certain course, and decides to chance it rather than adopt another and safer alternative, that is fault.[1] "He is not entitled to trust to fortune or good luck." [2] If there is no reason to suspect the risk, however, no blame attaches,[3] and if there is a reasonable doubt as to whether a certain course would be effective he is not bound to take it.[4] Again, where there are two options of approximately equal merit, "a mere error of judgment in choosing between [them] ought not to be counted negligence." [5] In the same way a contractor is not liable because he has adopted a method of work which has caused damage, so long as his *modus operandi* was usual and approved in his line of business.[6] It is irrelevant to say that by another method loss would in fact have been avoided. Nor is an owner of works bound to install the very latest apparatus in order to insure his neighbours.[7] As indicated above,[8] the standard is that of the ordinary prudent seaman or works manager, and not that of the Admiralty navigator or the millionaire philanthropist. The same principles apply to persons adopting any recognised custom (such as leaving vessels without watchmen,[9] or leading bulls through the streets instead of carting them) [10] or system (*e.g.* of drainage,[11] spark arresting,[12] or punishing girls).[13] They are not necessarily at fault because they did not follow some safer course.[14] As the ancients said, *Omni culpa caret qui facit id quod omnes facere solent.*[15]

(iii) *Skill.*

568. Everyone is supposed also to have a certain degree of skill,[16] and to exhibit this in any operation he undertakes; but there is no liability for mere mischance.[17] In the case of an amateur the standard is not very high. He is hardly to be expected to hit a nail on the head every time, and is not bound to compensate his victims if he misses.[17]

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[1] Per Lord Neaves in *King* v. *Pollock*, 1874, 2 R. 42, at p. 44; *Bastable* v. *North British Rly. Co.*, 1912 S.C. 555.

[2] Per Lord Meadowbank in *Lyon* v. *Lamb*, 1838, 16 S. 1188, at p. 1195.

[3] *King*, *supra*.

[4] *S.S.* "*Toward*" v. *S.S.* "*Turkestan*," 1885, 13 R. 341; per Lord Shaw in *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21, at p. 30.

[5] Per Lord Dunedin in *S.S.* "*Baron Vernon*," *supra*, at p. 28; see also per Lord Shaw at pp. 29, 30.

[6] *Kidston* v. *Caledonian Rly. Co.*, 1894, 31 S.L.R. 564.

[7] *Wisely* v. *Aberdeen Harbour Commissioners*, 1887, 14 R. 445.

[8] See para. 562, *supra*.

[9] *S.S.* "*Toward*," *supra*.

[10] *Harper* v. *Great North of Scotland Rly. Co.*, 1886, 13 R. 1139.

[11] *North British Storage and Transit Co.* v. *Steele's Trs.*, 1920 S.C. 194.

[12] *Murdoch* v. *Glasgow and South-Western Rly. Co.*, 1870, 8 M. 768.

[13] *Scorgie* v. *Lawrie*, 1883, 10 R. 610.

[14] See also *Ovens* v. *Bo'ness Gas Co.*, 1890, 28 S.L.R. 112.

[15] Mackenzie, Laws and Customs, i. 11, 9.

[16] Per Lord Kinnear in *Reilly* v. *Greenfield Coal and Brick Co.*, 1909 S.C. 1328, at p. 1342; see also Pollock, p. 457.

[17] *Gray* v. *Douglas*, 1890, 17 R. 858.

The position of professionals is different. They must attain the normal degree of proficiency in their particular line.[1]

(iv). *Knowledge.*

569. Further, a certain amount of knowledge is expected. For instance, harbour-masters must know the state of the tide.[2] Keepers of animals must be familiar with their ordinary propensities,[3] and there is thus a duty not to send out a restive horse in charge of a boy of fourteen or fifteen.[4] In the same way people are bound to realise the dangerous nature of some ordinary materials and processes. Thus one must not leave paint scrapings where cattle may eat them,[5] or accumulate great masses of highly inflammable waste matter.[6] Where a danger is not obvious it is the duty of those who know of it to warn others,[7] even if there is no reason to anticipate disaster.[8] On the other hand, no one can be expected to have before him the very latest scientific data as to the properties of necessary trade materials.[9] The standard is that of the ordinary business man, not of the University professor. Very little knowledge is required of a common carrier as to the nature of goods entrusted to him.[8]

(v) *Intelligence.*

570. The highest quality expected is that of intelligence. In law one must be able to put two and two together, to reach the correct total, and to act upon that basis. For example, a man employed a joiner to repaint some boats on a Highland loch. Paint scrapings were left which poisoned a cow, and damages were awarded against the employer.[5] It was evidently his duty to know that there would be scrapings, that these would be edible by and dangerous to cattle, and to anticipate that the workman might leave them behind. The risk involved in ordering the work to be done would not have been appreciated by one man in ten, and yet negligence was held to be established. This decision is directly at variance with an Outer House case, where magistrates were held not liable for failing to provide against military authorities leaving unexploded bombs in a public place.[10] Again, a seaman is bound to realise that a rope with a strain on it may catch accidentally, break, and injure a spectator.[11] On the other hand, a railway company are not obliged on seeing "weed-killer" on a leaking package to take any steps to prevent contamination of foodstuffs, because they have no real reason to suspect a danger of poisoning the public.[1] The necessity for foresight is dealt with under the head of Probable Consequence.[2]

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[1] See, *e.g.*, *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 270 ; as to the professions, see *Dickson* v. *Hygienic Institute*, 1910 S.C. 352 ; Glegg, p. 13.

[2] *Renney* v. *Mags. of Kirkcudbright*, 1892, 19 R. (H.L.) 11.

[3] Bell's Prin., s. 553 (3).

[4] *Brown* v. *Fulton*, 1881, 9 R. 36 ; *Richardson* v. *Beattie*, 1923, S.L.T. 440.

[5] *Stewart* v. *Adams*, 1920 S.C. 129.

[6] *Chalmers* v. *Dixon*, 1876, 3 R. 461.

[7] *Nautilus S.S. Co.* v. *Wm. Henderson & Co.*, 1919 S.C. 605.

[8] *Cramb* v. *Caledonian Rly. Co.*, 1892, 19 R. 1054.

[9] *Galloway* v. *King*, 1872, 10 M. 788 ; cp. *Chalmers*, *supra*, and English law as in *Rainham Chemical Works* v. *Belvedere Co.*, [1921] 2 A.C. 465.

[10] *Davidson* v. *Aberdeen Mags.*, 1919, 2 S.L.T. 213.

[11] *Craig* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 736.

SUBSECTION (6).—*Probable Consequence.*

(i) *General Considerations.*

571. In addition to the virtues specified above, the model citizen desiderated by the law requires to exhibit an ordinary degree of foresight.[3] But the quality demanded is not that of "second sight"; he need only shew "the utmost care to which human foresight could reach."[4] Duty, in short, "only emerges if it may be reasonably suggested that the defender was bound to foresee what occurred, and to take proper steps to prevent it."[5] This fundamental element deserves separate treatment, as it is generally discussed from a negative standpoint, and because of its complexity. It is commonly known as the rule of "natural and probable consequence," and really underlies many accepted maxims in the realm of negligence. This was first formulated to meet the extreme case of active third party intervention, but it is of general application. The principle of the famous "balloon" decision was expressed by Lord Shand as follows.[6] There will always be liability for "the natural and probable consequence of the action of the defender —a consequence which [he] ought to have foreseen." There may be great difference of opinion, however, as to the precise application of the test to particular circumstances.[7]

572. When damage has resulted directly from the defender's act, there is not much difficulty in determining whether there is a duty to foresee. Subject to the considerations above mentioned, there will in general be such a duty. But the position is altogether different when the loss is only an indirect consequence of the alleged fault. In order that there may be negligence a causal connection between these two events must be established.[8] If there is no *nexus* between them there can be no duty of anticipation. This is so, as a rule, when there has supervened upon the defender's act some independent and unexpected occurrence, whether a pure accident or due to natural or human agency.[9] On the other hand one must always make allowance for the natural course of events. Thus, in dealing with water it has to be remembered that it will freeze in cold weather,[1] but one is not bound to anticipate that a drain will have accidentally become blocked so that it does not escape as it normally would.[2] Accordingly, if water is allowed to run upon a public thoroughfare and it freezes and someone falls in consequence, there will be liability if there was no drain,[1] but not if there was one and it was blocked.[2] In the same way a seaman must consider the weather; [3] but he is not at fault if he fails to anticipate that the wind will completely change and blow a gale.[4] Again, everyone is held to know that boys will be boys, and that if he admits them to his premises [5] they will swing on gates,[6] eat berries,[7] and handle firearms.[8] If he does not foresee these things he is negligent. There is also (apparently) duty to anticipate that workmen will leave harmful things about,[9] but perhaps this does not apply to soldiers.[10]

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[1] *Cramb* v. *Caledonian Rly. Co.*, 1892, 19 R. 1054.

[2] See paras. 571 *et seq.*, *infra.*

[3] *E.g.* per Lord Kinnear in *Reilly* v. *Greenfield Coal and Brick Co.*, 1909 S.C. 1328, at p. 1342.

[4] Per Lord Chief Commr. Adam in *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 269; see also per Lord Meadowbank in *Lyon* v. *Lamb*, 1838, 16 S. 118, at p. 1195.

[5] Per Lord Anderson in *Edwards* v. *London, Midland and Scottish Rly. Co.*, 1928 S.C. 471, at p. 480.

[6] *Scott's Trs.* v. *Moss*, 1889, 17 R. 32, at p. 37.

[7] It has even been held that injury to a motor cyclist by collision with sheep on the highway was not such a consequence of allowing fences to fall into disrepair—*Fraser* v. *Pate*, 1923 S.C. 748.

[8] *North British Storage and Transit Co.* v. *Steele's Trs.*, 1920 S.C. 194, especially per Lord Justice-Clerk Scott-Dickson at p. 203.

[9] See next para.

573. But that is not all, for one must also guard against occurrences which, though never very clearly explained, experience proves likely to happen. For instance, it is fault to leave anything lying on the window sill which may fall into the street below,[11] or to collect near the march a mass of very inflammable material which may take fire.[12] But, on the other hand, one need not anticipate that a defective window cord will result in the precipitation of broken glass on the perambulating public,[13] for that is not within the "reasonable contemplation of anyone." [11] In the same way a man depositing rubbish at the foot of a wall is not responsible if children use it to climb over,[14] nor is a contractor if extraordinary rainfall makes safe operations dangerous.[15] A proprietor is not bound so to construct his premises as to avoid all risk of damage in the unlikely events of a fire occurring,[16] or of frost filling up the groove of a door,[17] or someone trying to force a horse and cart through a half-open gate.[18] Aggravation of illness seems not to be the natural and probable consequence of unwarrantable annoyance in business,[19] nor serious injury of ordinary chastisement in school.[20]

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[1] Per Lord Pres. Dunedin in *O'Keefe* v. *Edinburgh Corporation*, 1911 S.C. 18, at p. 20.

[2] *Sharp* v. *Powell*, 1872, L.R. 7 C.P. 253.

[3] *Mann, M'Neal & Co.* v. *Ellerman Lines*, 1904, 7 F. 213, at p. 219; per Lord Fraser in *S.S.* "*Toward*" v. *S.S.* "*Turkestan*," 1885, 13 R. 342, at p. 344.

[4] *Niven* v. *Ayr Harbour Trs.*, 1897, 24 R. 883; 1898, 25 R. (H.L.) 42.

[5] Not if they are trespassers, see next para.; see also *Linwood* v. *Hathorn*, 14th May 1817, F.C.; 1821, 2 Sh. App. 20.

[6] *Cormack* v. *Wick School Board*, 1889, 16 R. 812; cp. *M'Murray* v. *School Board of Glasgow*, 1916 S.C. 9.

[7] *Taylor* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 1.

[8] *King* v. *Pollock*, 1874, 2 R. 42.

[9] *Stewart* v. *Adams*, 1920 S.C. 129.

[10] *Davidson* v. *Aberdeen Mags.* (O.H.), 1919, 2 S.L.T. 213.

[11] Per Lord Justice-Clerk Macdonald in *Robinson*, *infra*, at p. 930.

[12] *Chalmers* v. *Dixon*, 1876, 3 R. 461, per Lords Ormidale and Moncreiff at pp. 466–7, 464; see also *Stewart* v. *Astor & Faith*, 1925, S.L.T. 7.

[13] *Robinson* v. *Reid's Trs.*, 1900, 2 F. 928.

[14] *Thomson* v. *Lanarkshire Rly. Co.*, 1897, 24 R. 1025; *Horsburgh* v. *Sheach*, 1900, 3 F. 268.

[15] *Kidston* v. *Caledonian Rly. Co.*, 1894, 31 S.L.R. 564.

[16] *M'Culloch* v. *Clyde Navigation Trs.*, 1903, 5 F. 1149.

[17] *Murphy* v. *Smith*, 1886, 13 R. 985.

[18] *Daily* v. *Allan*, 1885, 12 R. 841.

[19] *Pridie* v. *Dick*, 1857, 19 D. 287, at p. 289.

[20] *Scorgie* v. *Lawrie*, 1883, 10 R. 610.

574. Cases of active third party interference are so special as to merit separate treatment.[1] It should be noted here that the element of probable consequence may also arise at a later stage, namely, in determining whether there is to be liability for an established breach of duty. In that case somewhat different considerations are involved.[2] Unfortunately Mr. Glegg [3] did not sufficiently distinguish between these two cases. So far as negligence is concerned there is only one question, namely, whether the act complained of was likely to cause damage? So far as liability is concerned there are two separate questions: (*a*) did it in fact have that effect? and (*b*) was it likely to do so?

(ii) *Third Party Interference.*

575. While it is quite unsafe to say in this connection that anyone acting lawfully is entitled to assume that others will do the same,[4] as a general rule there is no duty to anticipate the thoughtless interference of third parties.[5] Thus no liability attaches to a railway company for a casualty occasioned by the owner of a private siding allowing a truck to run on to the main line,[5] or to a householder because someone precipitately opens a door on to the street and injures a passer-by.[6] But one must not have his property in such a precarious and rickety condition that it will become readily dangerous, as for instance by a bump from a swinging bale,[7] or "an idle boy giving it a shove." [8] Apart from this a person's obligations will depend upon whether his acts take effect in a place to which the public have access, or upon his own premises.[9] With regard to operations upon private property liability is primarily determined by the ordinary rules of law. Thus there is no need to protect trespassers from the actions of others.[10] This has been decided with regard to timber baulks,[11] gates,[12] heaps of stones,[13] and railway trucks,[14] but there has been no case in Scotland relating to things dangerous *per se*. There may be a duty to licensees and invitees. As to the former, one is bound not to leave traps which are likely to be set in motion by fellow licensees, as for instance by leaving about loaded firearms,[15] or petrol in place of water.[1] But one is not liable for the malicious act of a third party.[2] For invitees apparently one must see that things are kept safe from any meddling which may be reasonably foreseen.[3] The test in every case is whether or not the interference of third parties should have been within the contemplation of a reasonable man.

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[1] See next para. [2] See para. 588, *infra*. [3] Reparation, pp. 12, 38.

[4] Mr. Beven's dictum to this effect (i. 42) has, however, been adopted in the Outer House in *Davidson* v. *Aberdeen Mags.*, 1919, 2 S.L.T. 213.

[5] *Aitken* v. *Snowdoune*, 1861, 23 D. 962, at p. 965.

[6] *Evans* v. *Mags. of Edinburgh*, 1916 S.C. (H.L.) 149.

[7] *Beveridge* v. *Kinnear & Co.*, 1883, 11 R. 387.

[8] Per Lord Young in *Murphy* v. *Smith*, 1886, 13 R. 985, at p. 988.

[9] Glegg, p. 308.

[10] Per Lord Justice-Clerk Moncreiff in *Findlay* v. *Angus*, 1887, 14 R. 312, at p. 315; *Edwards* v. *London, Midland and Scottish Rly. Co.*, 1928 S.C. 471; see also *Galloway* v. *King*, 1872, 2 R. 788, and authorities *infra*.

[11] *M'Lean* v. *Symington & Sons* (O.H.), 1906, 14 S.L.T. 335.

[12] *M'Murray* v. *School Board of Glasgow*, 1916 S.C. 9.

[13] *Latham* v. *R. Johnson & Nephew*, [1913] 1 K.B. 398.

[14] *Collumb* v. *Turners* (O.H.), 1908, 15 S.L.T. 845; *M'Dowall* v. *Great Western Rly. Co.*, [1903] 2 K.B. 331; see also *Hay* v. *North British Rly. Co.*, 1867, 4 S.L.R. 136, and per Lord Anderson in *Edwards*, *supra*, at p. 480.

[15] *King* v. *Pollock*, 1874, 2 R. 42.

576. Most of the cases, however, have related to places to which the public have access. As a rule the ordinary citizen has no duty to anticipate third party interference, provided he is dealing with something which is not dangerous *per se* or in a dangerous condition. Thus a supplier of water is not bound to foresee that someone else will spill it,[4] or a man who puts rubbish on a coup that a stranger will set fire to it, even though he knows that this is sometimes done.[5] In the same way there is no responsibility where gates are carelessly opened by others without authority and anyone is hurt in consequence.[6] Also a person leaving a hand-cart in a lane is not bound to foresee that it will be tilted in his absence.[7] But, on the other hand, there may be liability for the result of a prolonged course of abuse by strangers.[8] The case of a machine situated in a public place, but operated from adjacent private premises, creates some difficulty. If the controls are readily accessible to mischievous children there may be liability even for the interference of trespassers.[9] It should be noted that a quite exceptional duty attaches to the magistrates of a burgh, who are bound to take extraordinary precautions to secure the safety of public places.[10]

(iii) *Crowds.*

577. Where the intervention is by a crowd and not by an individual special considerations are introduced. In certain circumstances a general stampede is naturally to be anticipated, and if so there is a duty to guard against it. The leading case of liability was one where an amusement caterer arranged for a descent from a balloon by parachute within a limited area, and charged the public for admission. The parachute miscarried into neighbouring grounds and spectators who were not in the enclosure at all broke in and damaged crops.[11] This was a hard decision for the defender, who did not desire their presence in any way. Again, a tramway company has been held bound to anticipate a rush of boarders at a stopping place.[1] But there is no duty if there is no reason to suspect unusual or disorderly conduct.[2] One cannot always control a crowd.[3] There have been several cases relating to railway companies. As a rule there is no liability on them unless there has been some special fault, such as admitting too many people to one platform.[4] A corporation has been held not liable for theft committed by a crowd.[5]

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[1] *Ross* v. *M'Callum's Trs.*, 1922 S.C. 322; Lord Moncrieff was prepared to go even further in *Edwards* v. *London, Midland and Scottish Rly. Co.*, 1928 S.C. 471, but the other judges reserved their opinions.

[2] Per Lord Salvesen in *Howie* v. *Ailsa Shipbuilding Co.*, 1912 S.C. 1225, at p. 1229.

[3] *Stewart* v. *Adams*, 1920 S.C. 129; *Wilson* v. *Glasgow and South-Western Rly. Co.*, 1915 S.C. 215.

[4] Per Lord Pres. Dunedin in *O'Keefe* v. *Edinburgh Corporation*, 1911 S.C. 18, at p. 20.

[5] *Johnstone* v. *Mags. of Lochgelly*, 1913 S.C. 1078.

[6] *Murphy* v. *Smith*, 1886, 13 R. 985; *Burns* v. *Steel Co. of Scotland*, 1893, 21 R. 39; a hinged door is different, see *Findlay* v. *Angus*, 1887, 14 R. 312.

[7] *Duff* v. *National Telephone Co.*, 1889, 16 R. 675; cp. *Pendreich* v. *Mags. of Edinburgh*, 1928 S.N. 22, and *Lynch* v. *Nurdin*, 1841, 1 Q.B. 29.

[8] *M'Kinlay* v. *Darngavil Coal Co.*, 1923 S.C. (H.L.) 34.

[9] *Hayman* v. *City Property Corporation*, 1929 S.C. (H.L.) 65.

[10] *Innes* v. *Mags. of Edinburgh*, 1798, Mor. 13189; 6th February 1798, F.C.; *Dargie* v. *Mags. of Forfar*, 1855, 17 D. 730; *M'Leod* v. *Mags. of St. Andrews*, 1924 S.C. 960.

[11] *Scott's Trs.* v. *Moss*, 1889, 17 R. 32; approved by Lord Dunedin in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, at p. 975.

(iv) *Dangerous Things.*

578. Dangerous things in public places are exceptional, and the public must always be protected against the risk of meddlers putting them in operation.[6] Thus damages were awarded where a crushing machine was left untended in a market place, and a child was injured by a passer-by.[7] Tying up such a machine is a sufficient precaution to prevent harm: one is not bound to use a padlock and chain.[8] It is fault to leave a loaded gun in a smithy,[9] and liability has been imposed for a hoist[10] and a hinged door.[11] It has been said also that it is dangerous to leave a horse untended in a street.[12] On the other hand, it has been held in the Outer House that an authority in charge of a public place is not responsible for seeing that unexploded bombs used by its licensees are all removed. This decision is perhaps open to reconsideration.[13]

SECTION 4.—ELEMENTS OF LIABILITY.

579. As indicated above, negligence will not entail liability unless (1) *damnum* has resulted, which (2) is causally connected with the negligence, and (3) is not too remote. A claim may thus fail if there is no loss recognised by law,[14] or if the loss did not result from the fault,[15] or if it was not a consequence which a sentient wrongdoer was likely to anticipate.[16] On the other hand, "if the mischief which happened was the direct and natural consequence of the defender's negligence, the pursuer is entitled to recover."[17]

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[1] *Buchanan* v. *Glasgow Corporation*, 1919 S.C. 515.

[2] *MacCallum* v. *North British Rly. Co.*, 1908 S.C. 415.

[3] Per Lord Justice-Clerk in *MacCallum, supra*, at p. 418.

[4] *Macgregor* v. *Glasgow Subway Co.*, 1901, 3 F. 1131; *Fraser* v. *Caledonian Rly. Co.*, 1902, 5 F. 41; *M'Arthur* v. *Glasgow Subway Rly. Co.* (O.H.), 1922 S.L.T. 32.

[5] *Pain & Son* v. *Corporation of Glasgow* (O.H.), 1898, 6 S.L.T. 154.

[6] Per Lord Sumner in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, at p. 985.

[7] *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149.

[8] *M'Gregor* v. *Ross & Marshall*, 1883, 10 R. 725.

[9] *King* v. *Pollock*, 1874, 2 R. 42, at p. 44.

[10] *Hayman* v. *City Property Corporation*, 1929 S.C. (H.L.) 65.

[11] *Findlay* v. *Angus*, 1887, 14 R. 312.

[12] Per Lord Shand in *Duff* v. *National Telephone Co.*, 1889, 16 R. 675, at p. 676.

[13] *Davidson* v. *Aberdeen Mags.*, 1919, 2 S.L.T. 213; it can hardly be reconciled with *Stewart* v. *Adams*, 1920 S.C. 129.

[14] See para. 580, *infra*. [15] See para. 583, *infra*. [16] See para. 588, *infra*.

[17] Per Lord Kinnear in *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.*, 1897, 24 R. 1001, at p. 1007.

Subsection (1).—Damnum.

580. Reparation being by definition the making good of loss, there can be no liability without loss.[1] Thus Erskine says[2] that "every unwarrantable act, by which another suffers damage . . . subjects the delinquent to reparation." For instance, a trustee is not responsible though by his delay the beneficiaries are prevented from attempting to recover a debt, if the debtor is totally unable to raise the money due.[3] They have lost nothing and therefore can claim nothing. In the same way there must be loss under each separate head of damage claimed.[4] It is not enough, however, to absolve a defaulter that the rights he has failed to secure turn out to be legally unenforceable. If as a matter of fact they might have been satisfied there will be liability.[5] In the same way the insolvency of the obligor does not necessarily exonerate one who has failed to do diligence, because friends might have honoured the debt.[6] In the old days every creditor was entitled to the benefit of *squalor carceris*, which had wonderful effects in securing payment. Magistrates and jailers who allowed escapes to take place could not plead that the prisoner himself had no funds.[7] It should be added that as soon as any one of several joint delinquents makes reparation the damage ceases to exist, and no further claim can be made against the others.[8]

581. According to the institutional writers,[9] reparation was due for "everything by which a man's estate is lessened," but this is not an accurate statement of the law at the present day. All physical injury to person or corporeal property may give rise to liability,[10] but not all financial injury, for there is no general duty *ex factis et rebus* to avoid this. Such a duty is imposed, however, by contract or public office. Thus a law agent is responsible in this respect to his client,[11] and a clerk of Court to a litigant,[12] but the man in the street is not responsible to the man round the corner. Nervous shock[13] and grief caused by the death of near relatives[14] are reckoned as physical injury, but not annoyance though resulting in illness.[15] Some types of loss are looked on as inevitable if the world is to progress at all, and are thus disregarded by the law. So no action lies for interference with business due to the dust, noise, and obstruction of building operations next door.[16] Whether or not consequential damage is recoverable depends on the principle of natural and probable consequence to be expounded later.[1] As contrasted with breach of contract, negligence justifies a claim for "the highest advantages which, but for the delict, would have been enjoyed." [2] As contrasted with malice, no *pretium affectionis* can be recovered.[3]

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[1] Stair, i. 9, 1–3; Glegg, p. 108.

[2] iii, 1, 13.

[3] *Millar's Trs.* v. *Polson*, 1897, 24 R. 1038; cp. *Davidson* v. *Mackenzie*, 1856, 19 D. 226; see also *Murray* v. *Watson*, 1828, 6 S. 802.

[4] *Kerr* v. *Earl of Orkney*, 1857, 20 D. 298, see p. 304.

[5] *Stiven* v. *Watson*, 1874, 1 R. 412; opinions in *Davidson* v. *Mackenzie*, 1856, 19 D. 226; *Turnbull* v. *Cruikshank*, 1905, 7 F. 791.

[6] Per Lord Pres. Robertson in *Millar's Trs.*, *supra*, at pp. 1043, 1044.

[7] Ersk. iii. 1, 13; iv. 3, 14; see *M'Millan* v. *Gray*, 2nd March 1820, F.C.

[8] Ersk. iii. 1, 15.

[9] Ersk. iii. 1, 13, 14; Bankt. i, 10, 41; see also Bell's Prin., s. 553 (1).

[10] See para. 543, *supra*.

[11] *Tully* v. *Ingram*, 1891, 19 R. 65.

[12] Ersk. iii. 1, 13.

[13] See para. 544, *supra*.

[14] See Reparation.

[15] *Pridie* v. *Dick*, 1857, 19 D. 287.

[16] *Laurent* v. *Lord Advocate*, 1869, 7 M. 607.

582. As a general rule damage must be proved, and is not inferred as in slander.[4] In one case, however, that of injury to the person, wounded feelings are presumed *juris et de jure* so as to entitle to *solatium.*[5] Thus it is not competent to lead evidence that a person whose life has been taken away was a burden of which his relatives were well quit.[6] To satisfy the test of relevancy it is not necessary to specify the precise nature of the damage averred.[7]

SUBSECTION (2).—*Causal Connection.*

583. In order to fix liability a pursuer must shew not only negligence and damage, but a direct causal connection between the two.[8] "He must so connect the accident with the *culpa* as to deduce clearly the liability which he seeks to enforce." [9] This doctrine has already been incidentally discussed [10] as bearing upon the primary question of whether there is any negligence. For there can be none unless there is some sort of *nexus* between the act complained of and the damage, because otherwise there is no likelihood of the act being harmful. In this subsection, however, negligence is assumed, and the present question is whether it was in fact harmful. A defender is not responsible, of course, for anything which merely happens to follow upon his fault in point of time, unless it is a direct consequence. If the averments only amount to *post hoc*, and not to *propter hoc*, the case falls by reason of *non sequitur.*[11] This applies not only to damage in general, but also to each item [12] or part of it.[15]

584. A defaulter may thus be absolved (firstly) on the simple ground that his act is not proved to have effected the damage,[8] or, to say the same thing in another way, that the care omitted would not in fact have avoided it;[1] (secondly) he may also escape because the real operative cause was something independent, which he was not bound to foresee,[2] such as either (*a*) a *novus actus interveniens*, which chanced to coincide with his negligence, or (*b*) a pre-existing relationship (such as a contract), involving obligations brought into operation by the disaster. An alternative presentment of this second ground of exemption is to be found in the maxim *causa proxima non remota spectatur*.[3] Although these two bases of irresponsibility are often treated alike, under the head of remoteness,[4] they are essentially different. In the first the chain of causation has never been established; in the second it has been broken. This has an important effect on the onus of proof, as it is for the pursuer to shew connection,[5] but for the defender to make out severance.[6] Often both grounds are pleaded in the same case.[7] Mere absence of causal connection will be treated first,[8] and then cases in which the real operative cause is an independent and pre-existing legal relationship.[9] Liability for a *novus actus interveniens*[10] will be dealt with after the doctrine of natural and probable consequence has been interpreted,[11] as liability depends on that doctrine in Scotland.

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[1] See para. 588, *infra.*

[2] Bell's Prin., s. 545 (2); see also Bankt. i. 10, 7.

[3] Bankt. i. 10, 44.

[4] Glegg, p. 108; *Kerr* v. *Earl of Orkney*, 1857, 20 D. 298.

[5] *Vide* REPARATION.

[6] *Black* v. *Cadell*, 8th February 1804, F.C.; *Brown* v. *Macgregor*, 26th February 1813, F.C.; *Richmond* v. *Russell*, 1849, 11 D. 1035; but cp. *Brash* v. *Steels*, 1845, 7 D. 539; and Glegg, p. 121, n.

[7] *Bell* v. *Simpson*, 1867, 5 M. 298.

[8] Per Lord Meadowbank in *Lyon* v. *Lamb*, 1838, 16 S. 1188, at p. 1195; *Edgar* v. *Law & Brand*, 1871, 10 M. 236; *Greer* v. *Turnbull & Co.*, 1891, 19 R. 21; *Barrie* v. *Police Commissioners of Kilsyth*, 1898, 1 F. 194; per Lord Dunedin in *M'Kinlay* v. *Darngavil Coal Co.*, 1923 S.C. (H.L.) 34, at p. 37; see also *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama,*" 1928 S.C. (H.L.) 21, per Lords Haldane and Dunedin at pp. 26, 27; and *Craig* v. *Glasgow Corporation*, 1919 S.C. (H.L.) 1, per Lord Finlay at p. 8.

[9] Per Lord Ardmillan in *Lumsden* v. *Russel*, 1856, 18 D. 468, at p. 469; see also per Lord Cowan in *Balfour* v. *Baird & Brown*, 1857, 20 D. 238, at p. 244, and in *Sutherland* v. *Monkland Rly. Co.*, 1857, 19 D. 1004, at p. 1005.

[10] See para. 571, *supra.*

[11] See, *e.g.*, per Lord Phillimore in *S.S.* "*Baron Vernon,*" *supra*, at p. 31.

[12] See per Lord Gillies in *Scott* v. *Tait & Russell*, 1826, 4 Mur. 57, at p. 60.

[13] *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915.

585. There are not many cases in the Scots books in which a defender has escaped purely on the negative ground that the sequence of cause and effect has not been established. A defender would not be liable if the negligence did not have any effect at all, as where a wrong helm order was given just before a collision, but there was not time for the ship to respond to it.[12] It is the same if the negligence has some effect, but would not have caused the damage but for the absence of some other factor normally present. Examples of this are cases in which a vessel's anchor was not in readiness, but there was no crew on board to handle it if it had been,[13] and where a pursuer had been deprived of opportunities in business of which he was too poor to take advantage.[14] The same result is reached if negligence only took effect after an accident, and helped to aggravate the loss.[15] Another case of exoneration on this ground is where the cause of the damage is a mystery. Thus the Court held no *nexus* made out where a deceased had fallen over the unguarded parapet of a bridge, which he knew well, just after leaving a public-house.[1] Liability was likewise negatived for the explosion of naphtha in a yard without apparent cause.[2]

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[1] *Edgar* v. *Law & Brand*, 1871, 10 M. 236; *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21; see also *Gilchrist* v. *Ballochney Rly. Co.*, 1850, 12 D. 979.

[2] In some circumstances one is bound to foresee such occurrences; see para. 571, *supra*.

[3] See Glegg, p. 38.

[4] See, *e.g.*, per Lord Dunedin in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, at p. 975.

[5] Per Lord Meadowbank in *Lyon* v. *Lamb*, 1838, 16 S. 1188, at p. 1195; *Edgar*, *supra*, per Lord Ardmillan at p. 290, Lord Kinloch at pp. 291, 292, Lord Pres. Inglis at p. 243; cp. per Lord Deas in *Grant* v. *Caledonian Rly. Co.*, 1870, 9 M. 258, at p. 267.

[6] *S.S.* "*Baron Vernon*," *supra*, per Lord Haldane at p. 26, Lord Dunedin at p. 27, Lord Shaw at p. 29; the wrongdoer must shew that the precaution suggested would in the normal course of events have avoided the damage, per Lord Blanesburgh at p. 33.

[7] *E.g. Macfarlane* v. *Colam*, 1908 S.C. 56.

[8] See para. 585, *infra*.

[9] See para. 587, *infra*.

[10] See para. 591, *infra*.

[11] See para. 588, *infra*.

[12] *Laird Line* v. *U.S. Shipping Board*, 1924 S.C. (H.L.) 37, especially per Lord Dunedin at p. 39.

[13] *S.S.* "*Toward*" v. *S.S.* "*Turkestan*," 1885, 13 R. 342, at p. 346.

[14] Per Lord Collins in *Clippens Oil Co.* v. *Edinburgh District Water Trs.*, 1907 S.C. (H.L.) 9, at p. 14.

[15] *Gibb* v. *Edinburgh Tramways Co.*, 1913 S.C. 541.

586. So also the defender is entitled to be assoilzied where the *damnum* either existed in its entirety before the *injuria*, or was immediately inevitable. Thus there is no responsibility for the onset of a disease which has already taken root before an accident,[3] or for colliding with a ship which is already sinking.[4] In the same way, if any part of the damage was inevitable for another reason, that part cannot be recovered.[5] But an exception is made to these rules in respect of the shortening of human life, which is civilly actionable,[6] just as it is criminal.[7] Thus if death results from injury developing a pre-existing tendency,[8] or aggravating a pre-existing illness,[6] causal connection is established. Lastly, it has been held on similar grounds that where a creditor has not taken all possible steps to recover a debt, he cannot sue a third party by whose negligence the best means of obtaining payment has been lost.[9]

587. Damage cannot be ascribed to the fault of the defender if the real operative cause is to be found in some independent relationship which is brought into operation by the accident. Thus no one is allowed to claim for injury caused to some person,[10] property,[11] or business,[12] in which he had merely a contractual interest. Scots law, for instance, does not recognise the right of a master to sue for loss of his servant's services,[13] though this form of process is common in England. In the same way those who have contracts with an artiste cannot recover if the latter is incapacitated by the negligence of a third party.[14] Thus also pursuers who have an undoubted right of action cannot state as an additional head of damage the loss they may have suffered by reason of their having an interest in a business which has been rendered indirectly less profitable.[15] On the other hand, a good claim lies for the destruction of goods at the instance of an owner[1] or a part owner, as his interest is direct.[2] The relationships here referred to as being independent operative causes of loss are not necessarily confined to the sphere of contract. For instance, where information has wrongfully been given to the Inland Revenue the victim was not awarded the expense of satisfying the authorities that no tax was due.[3] In the same way, in an English collision case, an item of damage, representing a vessel's contribution to a general average loss, was disallowed because it became exigible only on account of the pre-existing relationship between ship and cargo.[4]

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[1] *Barrie* v. *Police Commissioners of Kilsyth*, 1898, 1 F. 194.

[2] Per Lord Low in *Howie* v. *Ailsa Shipbuilding Co.*, 1912 S.C. 1225, at p. 1229; see also per Lord Pres. Inglis in *Edgar* v. *Law & Brand*, 1871, 10 M. 236, at p. 243.

[3] Per Lord Johnston in *Morton* v. *Wm. Dixon, Ltd.*, 1909 S.C. 807, at p. 811.

[4] See *S.S.* "*Rowan*" v. *S.S.* "*Clan Malcolm*," 1923 S.C. 316.

[5] *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915; 1925 S.C. (H.L.) 41.

[6] *Golder* v. *Caledonian Rly. Co.*, 1902, 5 F. 123.

[7] Macdonald on Criminal Law, pp. 126, 127.

[8] *M'Donald* v. *Smellie*, 1903, 5 F. 955.

[9] *Glasgow Police Commissioners* v. *Donald*, 1894, 21 R. 895.

[10] *Levett* v. *London and North-Western Rly. Co.*, 1866, 2 S.L.R. 207; *Reavis* v. *Clan Line Steamers*, 1925 S.C. 725; *Quinn* v. *Greenock Tramways Co.*, 1926 S.C. 544.

[11] *Simpson & Co.* v. *Thomson*, 1877, 5 R. (H.L.) 40, especially per Lord Penzance at p. 46.

[12] *Roberts* v. *Earl of Rosebery*, 1845, 4 Mur. 1; *Quinn, supra.*

[13] *Allan* v. *Barclay*, 1864, 2 M. 873, especially per Lord Kinloch at p. 874.

[14] *Levett, supra*; *Reavis, supra*; per Lord Penzance in *Simpson, supra.*

[15] *Roberts, supra*, at p. 3; *Quinn, supra.*

SUBSECTION (3).—*Natural and Probable Consequence.*

588. Assuming that causal connection has been established, there remains the further question whether it has not been subsequently dissolved as indicated above.[5] This depends in Scotland on the doctrine of "natural and probable consequence," and in England, as a result of its recent express rejection,[6] on no clear principle at all. The Scots rule was first formulated as regulating damages for breach of contract, it being remarked[7] that certain consequential damage "may not have been, in a strict metaphysical sense, a necessary consequence of [the negligent act], but it was a natural and probable consequence, and I do not see why the defender's liability should not extend to [it]." It seems first to have been expounded apart from contract by Lord Kinloch in 1864,[8] when he laid down "the grand rule on the subject of damages," by which, of course, he meant reparation.[9] In his words this is "that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer." The same principle has been reiterated innumerable times[10] by various judges, though actual decisions have been so ambiguously worded that the precise point has been evaded.[11] Lord Kinloch's dictum is accepted by the text-writers,[12] and was approved by Lord President Clyde in 1925.[1] Another reason for its adoption is no doubt that "consequential or remote damages . . . are no favourites of the law"[2] of Scotland. Perhaps it is this insistence on the necessity for natural and probable causal connection which explains the extraordinary leniency of the old Scots judges towards trespassers[3] and those who were contributorily negligent.[4] What is such a consequence is, of course, largely a question of circumstances, but it should be remembered that to be natural and probable it need not be direct.[5]

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[1] *Fisken* v. *Glasgow Gas Co.*, 1850, 12 D. 757.

[2] *Main* v. *Leask*, 1910 S.C. 772.

[3] *Brown's Trs.* v. *Hay*, 1898, 25 R. 1112.

[4] *The "Marpessa,"* [1891] P. 403.

[5] See para. 583, *supra*.

[6] *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560.

[7] Per Lord Mackenzie in *Robertson* v. *Connolly*, 1851, 13 D. 779, at p. 781.

[8] *Allan* v. *Barclay*, 1864, 2 M. 873, at p. 874.

[9] See, *e.g.*, Guthrie Smith on Damages.

[10] Per Lord Young in *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118, at p. 1123; per Lord Wellwood in *M'Garrot* v. *Robert Addie & Sons' Collieries*, 1894, 2 S.L.T. 11; per Lord Kinnear in *Wilkinson* v. *Kinneil & Co.*, 1897, 24 R. 1001, at p. 1007, and in *Golder* v. *Caledonian Rly. Co.*, 1902, 5 F. 121, at p. 126; per Lord Stormonth-Darling in *Cooper* v. *Caledonian Rly. Co.*, 1904, 4 F. 880, at p. 882; see also per Lord Justice-Clerk Macdonald at pp. 882, 883; per Lord Dunedin in *Malone* v. *Cayzer, Irvine & Co.*, 1908 S.C. 479, at p. 482, and in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, at p. 975; per Lord Salvesen in *Macdonald* v. *David Macbrayne, Ltd.*, 1915 S.C. 716, at p. 725; and in *Ross* v. *M'Callum's Trs.*, 1922 S.C. 322, at p. 327; see also per Lord Justice-Clerk Scott-Dickson, at p. 327; per Lord Pres. Strathclyde in *Ross* v. *Glasgow Corporation*, 1919 S.C. 174, at p. 177; and per Lord Justice-Clerk Alness and Lord Anderson in *Fraser* v. *Pate*, 1923 S.C. 748, at pp. 753, 754.

[11] *Fraser, supra*, is a good example of this.

[12] Glegg, p. 38; Guthrie Smith, p. 379.

589. Until 1921 the balance of authority in England was in favour of a similar limitation,[6] but in that year the Court of Appeal laid down[7] as a general principle of English law that a man was liable "for all the direct consequences of the negligent act, . . . even though those consequences could not reasonably have been anticipated." In this view, natural and probable consequence is as a rule only relevant to the question of negligence and not to the further question of liability. The result was that where a workman carelessly knocked a plank into the hold of a vessel, which caused an explosion owing to the unsuspected presence of petrol vapour, his employers were held liable for the whole loss. This decision has met with considerable criticism in England,[8] has never been confirmed by the House of Lords, and seems to involve the overruling of several leading cases,[9] and to proceed upon a misapprehension of an opinion of Lord Sumner[10] which it professes to follow. In any event, it does not represent the law of Scotland. At no time has this ratio received expression from the Bench in this country, and it does not appear to have been argued here prior to 1921. The leading English dictum, which was overruled in that year, was expressly chosen in 1908 by Lord President Dunedin[11] as epitomising the common law of Scotland. It seems very likely that in Scotland the leaving of petrol vapour in the hold would have been treated as the proximate cause of the accident, as the Scots Courts are not thirled to the doctrine of the "last negligent act" as are the English Courts.[1] In any event, the damage would have been apportioned between that due to the workman's fault and that due to natural causes, the former being, of course, quite elusory.[2] But apart from this, it is thought that liability would have been negatived altogether here, because the damage was not the natural and probable consequence, or, in terms of the rubric quoted, because it was not a direct consequence.

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[1] *Reavis* v. *Clan Line Steamers*, 1925 S.C. 725, at p. 740; see also per Lord M'Laren in *Cameron* v. *Young*, 1907 S.C. 475, at p. 480. On the other hand, in *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915, defenders were held liable for damage due to their negligently flooding premises when in his Lordship's view the water was only made harmful by the sweeping away of an embankment by the overflow of a burn which was a pure accident (see p. 934).

[2] Per Lord Pres. Boyle in *Goldie* v. *Goldie*, 1842, 4 D. 1489, at p. 1498.

[3] See para. 547, *supra*.

[4] See para. 597, *infra*.

[5] Per Lord Dunedin in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, at p. 975; see also *Potter* v. *Hamilton and Strathaven Rly. Co.*, 1864, 3 M. 83.

[6] See Pollock, 11th ed., pp. 39, 40; Salmond, 5th ed., p. 131; Underhill, 10th ed., p. 81; Arnold on Damages, p. 18; cp. Beven, 3rd ed., i. 85.

[7] *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560.

[8] *E.g.* Pollock, 12 ed., vii., and Law Quarterly Review, xxxviii. 165; see also Cambridge Legal Essays, 1926, p. 101.

[9] *Cox* v. *Burbidge*, 1863, 13 C.B. N.S. 430, and *Sharp* v. *Powell*, 1872, L.R. 7 C.P. 253; the latter approved by Lord Sumner in *Weld-Blundell*, *supra*, at p. 984; see Pollock in L.Q.R., *supra*.

[10] *Weld-Blundell*, *supra*, at p. 984.

[11] *Malone* v. *Cayzer, Irvine & Co.*, 1908 S.C. 479, at p. 481.

590. The doctrine now approved in England is opposed not only to authority in Scotland, but also, it is thought, to principle, for in effect it severs liability from culpability. Suppose a case in which a man is only negligent because he fails to foresee a certain risk. Then if there eventuates, not that risk, but another which he could not have foreseen, there is no fault, or if there is fault there is no causal connection between the fault and the damage. There has intervened to separate the two an independent accident. For instance, in the English case negligence consisted not in dropping a plank (for no act is intrinsically negligent in all circumstances), but in doing so where there was danger to persons or property by impact. But the workman's failure to provide against that was not the cause of the catastrophe. If he had looked and seen the hold clear (which it was), the explosion would have happened just the same. It was due either to his failure to exercise "second sight," which is not negligence, or to accident, or to third party interference, which introduced a dangerous and invisible gas into the hold. Where statutory duties are concerned it is the rule even in England [3] that, if the object of their imposition is to prevent a certain type of loss, there will be no liability if another type results.[4] The ratio of this seems sound. But as regards common law duties the responsibility of defendants, as has been said,[5] is now "based not upon the actual results of their acts, but upon other results which might have but did not occur." The adoption of the rule here deprecated has left English lawyers without any principle upon which they can reconcile the varying decisions as to liability when there has been a *novus actus interveniens*, with the result that Lord Haldane [6] has reverted in these circumstances to the old Scots doctrine that "damage is recoverable . . . if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the situation which the [offender] had created."

SUBSECTION (4).—Novus actus interveniens.

591. Three types of *novus actus interveniens* have to be distinguished, each of which often exonerates the defender.[7] These are pure accident, fault of the pursuer, and third party interference. On the other hand, one must remember that "the duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter."[1] Another type of *novus actus*, which does not shift liability, is a second act of negligence by the defender himself.[2] With regard to the first case it is not usual to find an accidental occurrence sufficiently substantial to be an independent source of damage. But no responsibility is fixed where the operative cause is, for instance, a horse shying,[3] a dog breaking loose,[4] or a man stumbling,[5] provided that these phenomena are not directly due to the negligence of the defender. Where, however, a dog leapt upon A., who instinctively dropped a lump of coal on to B.'s foot, an action by B. was held relevant against a person who was in fault for not restraining the animal, because the accident was not in origin independent of the negligence.[6] There are some circumstances in which there may be liability for the result of a supervening accident, on the ground that there was such risk of its occurring that it ought to have been foreseen.[7] Thus it was held fault to heave on a warp without seeing that the decks were clear, although no injury would have come about unless the warp had accidentally fouled an obstruction, broken, and struck a man who was in the act of leaning over the ship's side to fetch up a bucket of water.[8] This seems to represent the high-water mark of culpability. It may be also that where anything *per se* dangerous is left untended, such as fire, there will be liability if it becomes active through accidental happenings.[9]

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[1] See para. 597, *infra*. [2] *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915.

[3] *Gorris* v. *Scott*, 1874, L.R. 9 Ex. 125.

[4] Scots authority is to the same effect; *O'Brien* v. *Arbib & Co.*, 1907 S.C. 975; see also *Morrison* v. *M'Ara*, 1896, 23 R. 564. [5] Cambridge Legal Essays, p. 115.

[6] *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21, at p. 25.

[7] See, however, Guthrie Smith, pp. 148, 149.

592. Where the fault of the defender would have caused no damage but for some unnecessary and unwarrantable action [10] by the injured party, the latter will in general be barred from compensation, even although the circumstances are not such as to raise against him the pleas of *volenti non fit injuria* [11] or contributory negligence.[12] No one is bound to foresee extraordinary actings.[13] Trespass [14] is a good example of a course of action which will bar a pursuer's claim. Likewise liability was negatived where boys of nine or ten years of age were injured by touching a winding-chain [15] or playing among timber battens.[16] Similarly if any particular head of damage might reasonably have been avoided by the pursuer, that head does not arise directly from the initial negligence.[1] But if he has not the means to take the steps necessary for safety the loss must still fall on the original wrongdoer.[2] One must take one's victim *talem qualem*. Also, if the errors of the injured party are due to his being deprived of the means of safety by the fault of the defender, the chain of causation is not broken.[3] The principles applicable to collisions at sea have recently been laid down in the House of Lords in a Scots case.[4] Where one vessel negligently collides with another, errors of judgment on the part of the innocent ship subsequent to the collision will not avail the original wrongdoer.

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[1] Per Lord Dunedin in *Dominion Gas Co.* v. *Collins*, [1909] A.C. 640, at p. 646.

[2] *Morrison* v. *M'Ara*, 1896, 23 R. 564.

[3] *Macfarlane* v. *Colam*, 1908 S.C. 56.

[4] *Greer* v. *Turnbull & Co.*, 1891, 19 R. 21.

[5] Opinions in *Gray* v. *North British Rly. Co.*, 1890, 18 R. 76.

[6] *Fraser* v. *Bell*, 1887, 14 R. 811.

[7] See Guthrie Smith, pp. 148, 149.

[8] *Craig* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 736.

[9] Probably Lord Dunedin's dictum, *supra*, had special reference to this; see also *per curiam*, Balfour's Practicks, 509, c. 8.

[10] See per Lord Haldane in *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21, at p. 26. A normal and reasonable action, of course, does not break the chain—*Robertson* v. *Connolly*, 1851, 13 D. 779.

[11] See para. 603, *infra*.

[12] See para. 594, *infra*.

[13] Per Lord M'Laren in *Cameron* v. *Young*, 1907 S.C. 475, at p. 480.

[14] See para. 547, *supra*.

[15] *Lumsden* v. *Russel*, 1856, 18 D. 468.

[16] *Balfour* v. *Baird & Brown*, 1857, 20 D. 238.

593. Difficult questions are raised when there has been interference by a third party supervening upon the fault of the defender. As a rule, particularly where that intervention is itself negligent, causal connection will be held to have been broken as between the initial fault and the *damnum*,[5] for no one is expected to anticipate "the conscious act of another volition."[6] For instance, an employer is not liable for damage due to a defect in his ways and works, which has only been made operative by the negligence of a fellow-workman,[7] unless, of course, the casualty is really due to the joint fault of master and man.[8] Nor will damages flow from allowing an animal to escape, if the real cause of the injury resulting is the effort of a stranger to round it up.[9] But if the act of the third party was either contributed to by the original defaulter, or ought to have been foreseen by him, he will be held responsible. An instance of the first exception is where a landlord so constructs drains as to facilitate misuse by his tenants,[10] or a contractor leaves an opening in premises which is an obvious attraction to thieves.[11] Probably this is the basis of the liability imposed in the Outer House upon a publican for failing to keep order, with the result that an unoffending customer was struck by a tumbler.[12] Otherwise the decision is difficult to justify. Examples of intervention which should have been foreseen are the actions of children,[13] and the instinctive acts of persons put in a state of alarm.[14] One is probably also bound to anticipate that certain risks will be incurred in the normal course of business. Thus one has to reckon with contact by the swinging bale of a neighbour,[1] and is bound to maintain property in a fit state to withstand it. One is also bound to foresee that traps will attract the unwary.[2] In these cases there will be liability on the initial defaulter, although the act of a third party has intervened. The famous English squib case [3] has been approved by Lord Dunedin,[4] but it is of doubtful authority in Scotland, as at its date trespass to the person was actionable in England apart from fault.[5] Lastly, an intervening act which only amounts to an error in judgment, and not to negligence, will not exonerate the party originally at fault.[6]

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[1] Per Lord Dunedin in *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama,*" 1928 S.C. (H.L.) 21, at p. 27.

[2] Per Lord Collins in *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1907 S.C. (H.L.) 9, at p. 14.

[3] "*City of Lincoln,*" 1890, 15 P.D. 15, approved by Lords Haldane and Phillimore in *S.S.* "*Baron Vernon,*" *supra*, at pp. 26, 31.

[4] *S.S.* "*Baron Vernon,*" *supra*.

[5] Cp., however, Guthrie Smith, p. 148.

[6] Per Lord Dunedin in *Dominion Gas Co.* v. *Collins*, [1909] A.C. 640, at p. 646.

[7] *Robertson* v. *Linlithgow Oil Co.*, 1891, 18 R. 1221; *Baxter* v. *Abernethy & Co.*, 1893, 21 R. 159; *Mackay* v. *John Watson, Ltd.*, 1897, 24 R. 383.

[8] *M'Garrot* v. *Addie & Sons' Collieries* (O.H.), 1894, 2 S.L.T. 11.

[9] *Gray* v. *North British Rly. Co.*, 1890, 18 R. 76.

[10] *Fleming* v. *Gemmill*, 1908 S.C. 340.

[11] *Marshall* v. *Caledonian Rly. Co.*, 1899, 1 F. 1060.

[12] *M'Fadyen* v. *White*, 1921, 1 S.L.T. 294.

[13] *Hayman* v. *City Corporation*, 1929 S.C. (H.L.) 65; see also *King*, *infra*.

[14] *Morrison* v. *M'Ara*, 1896, 23 R. 564; *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118; *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.*, 1897, 24 R. 1001; *Ramage* v. *Carswell* (O.H.), 1919, 2 S.L.T. 62.

SECTION 5.—DEFENCES TO NEGLIGENCE.

SUBSECTION (1).—*Contributory Negligence.*

594. Contributory negligence is the most common defence to a claim of damages. In order that a pursuer may succeed, not only must he shew fault of the defender, but also as a rule there must be no joint fault of his own.[7] For no one can recover from another in respect of damage due substantially to his own negligence.[8] *Quis ex culpa sua damnum sentit non intelligitur damnum sentire.*[9] This principle was first expounded in connection with obstacles on highways. "In every case of this sort," it was said,[10] "there are two ingredients [of liability]. There must be fault in the party setting up an obstruction on the road . . .; and there must, on the other side, be, in the main, ordinary care and attention . . . The person claiming must come with clean hands." The reason is, of course, that were it otherwise the defender's breach of duty would cease to be the proximate cause of the loss.[8] Contributory negligence may then be said to be the term applied in law to such fault on the part of an injured person [11] as will prevent the injury [12] being attributable to the fault of another. It has been recently defined [1] as "negligence on the part of a pursuer [2] which is itself jointly causative of the accident along with the negligence of the defender." But the contribution must be, of course, to the *injuria*, and not merely to the *damnum*. So if a pursuer originally innocent negligently fails to mitigate the loss, that will not bar his claim, though it naturally limits the amount for which he can recover to that part of the damage not due to his own fault.[3] Unfortunately the term "contributory negligence" is often loosely used even on the Bench as meaning any negligence on the part of a pursuer.[4] The general rule was laid down in Scotland at an early date,[5] but until 1858 [6] it was not definitely held to apply as between master and servant. An exception is admitted in Admiralty cases, where there is an apportionment of the loss according to the degree of blame attaching to the parties.[7] At common law, the defender is either liable for all or for nothing.

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[1] *Beveridge* v. *Kinnear & Co.*, 1883, 11 R. 387.

[2] *King* v. *Pollock*, 1874, 2 R. 42; *Stewart* v. *Adams*, 1920 S.C. 129; *Ross* v. *M'Callum's Trs.*, 1922 S.C. 322; see also *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149.

[3] *Scott* v. *Shepherd*, 1773, 2 Wm. Black. 893.

[4] *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, at p. 975.

[5] See Beven, p. 700; also p. 37.

[6] *Heddie* v. *North British Rly. Co.*, 1886, 14 R. 233, especially per Lord Young at p. 237.

[7] Per Lord Chief Commr. Adam in *Maclachlan* v. *Road Trs.*, 1827, 4 Mur. 216, at p. 221; per Lord Chancellor Cranworth in *Paterson* v. *Wallace & Co.*, 1854, 1 Macq. 748, at pp. 753, 757; *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160, especially per Lord Pres. Inglis at p. 163, approved by Lord Dunedin in *Weld-Blundell*, *supra*, at p. 977.

[8] *M'Naughton*, *supra*; per Lord Justice-Clerk Moncreiff in *Moffat* v. *Park*, 1877, 5 R. 13, at p. 19; per Lord Pres. Clyde in *Shillinglaw* v. *J. G. & R. Turner*, 1925 S.C. 807, at p. 816; Glegg, p. 43.

[9] Dig. l. 17, 203; See Guthrie Smith, p. 138.

[10] Per Lord Chief Commr. Adam in *Maclachlan*, *supra*; see also in *Millar* v. *Road Trs.*, 1828, 4 Mur. 563, at p. 568.

[11] There is no such thing as the contributory negligence of a defender, *Robinson* v. *Hamilton (Motors), Ltd.*, 1923 S.C. 838.

[12] One must distinguish between the *injuria* and the result of it; *e.g.* being run down is the *injuria*, not losing a leg; see per Lord Dunedin in *Gibb* v. *Edinburgh Tramways Co.*, 1913 S.C. 541, at p. 546.

595. Most of the elements of negligence are also essentials of contributory negligence. Thus, if a person is incapable of the one he cannot be guilty of the other.[8] It is sometimes said that the latter is mere carelessness, and not necessarily breach of a legal duty to take care, but it is submitted that this is incorrect.[9] Unless there is "want of . . . care which he was bound to exercise," [10] a pursuer, it is thought, should succeed. No doubt this is merely one instance of the general duty to minimise the loss of others,[11] which bulks so largely in questions of the amount of damages, and which is the basis of the defence of *volenti non fit injuria*.[12] In the same way contributory negligence must by definition contribute to the casualty,[13] which must follow from it directly and not remotely.[14] It must be proved just as substantially as ordinary negligence.[15] The onus of proof is, of course, on the party alleging it.[1] Formerly a separate issue of contributory negligence used sometimes to be allowed,[2] but this is not now the practice.

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[1] Per Lord Pres. Clyde in *Robinson* v. *Hamilton* (*Motors*) *Ltd.*, 1923 S.C. 838, at p. 841.

[2] *Robinson, supra.*

[3] *Moffat* v. *Park*, 1877, 5 R. 13, per Lord Gifford at pp. 17, 18; Lord Justice-Clerk Moncreiff at p. 19; *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21.

[4] *E.g. M'Allester* v. *Glasgow Corporation*, 1917 S.C. 430; see per Lord Pres. Clyde in *Shillinglaw* v. *J. G. & R. Turner*, 1925 S.C. 807, at p. 816.

[5] *Maclachlan* v. *Road Trs.*, 1827, 4 Mur. 216, at p. 221.

[6] *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160.

[7] *Innes* v. *Glass & Co.*, 1827, 4 Mur. 161; *Le Neve* v. *Edinburgh and London Shipping Co.*, 1824, 2 Sh. App. 395; per Lord Pres. Inglis in *M'Naughton, supra*, at p. 165; *Boettcher* v. *Carron Co.*, 1861, 23 D. 322; Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57).

[8] See per Lord Justice-Clerk Moncreiff in *Campbell* v. *Ord & Maddison*, 1873, 1 R. 148, at p. 153.

[9] See, *e.g.*, per Lord Kyllachy in *Port Glasgow Sailcloth Co.* v. *Caledonian Rly. Co.*, 1892, 19 R. 608, at p. 610.

[10] Per Lord Wood in *M'Naughton, supra*, at p. 167.

[11] Per Lord Gillies in *Scott* v. *Tait & Russell*, 1826, 4 Mur. 57, at p. 60; per Lord M'Laren in *Cameron* v. *Young*, 1907 S.C. 475, at p. 480; per Lords Haldane and Dunedin in *S.S.* "*Baron Vernon*," *supra*, at pp. 26, 27.

[12] See Guthrie Smith, p. 363.

[13] Per Lords Wood and Kyllachy *ut supra*; per Lord Trayner in *Sommerville* v. *Hardie*, 189 24 R. 58, at p. 64; *Taylor* v. *Dumbarton Tramways Co.*, 1918 S.C. (H.L.) 96.

[14] Per Lord Wood, *ut supra*.

[15] Per Lord Neaves in *M'Martin* v. *Hannay*, 1872, 10 M. 411, at p. 413; per Lord Ardmillan in *Potter* v. *North British Rly. Co.*, 1873, 11 M. 664, at p. 670.

596. The principle that negligence, to be reckoned in law contributory, must be a *causa proxima* and not merely a *causa remota*,[3] requires development. It is well established that if the fault of the pursuer was only remotely connected with the damage, he may still recover from the defender, as his own fault "is to be, as it were, discounted from the case." [4] The typical example is where, after the injured person has been the first negligent, the defender's negligence has supervened quite independently and unnecessarily and caused the accident. For instance, damages were given to the representatives of a man who foolishly anchored his boat in the course of steamers, on the ground that the proximate cause of his death was the carelessness of a vessel which ran him down.[5] This doctrine is generally attributed to the English case of *Davies* v. *Mann*,[6] decided in 1842, but it was a native principle in this country long before. Thus reparation was awarded in 1819 to a passenger who rashly encouraged the coachman to race, with disastrous results.[7] This branch of the law has recently been expounded in the House of Lords with reference to collisions at sea.[8] Where the pursuer's fault was remote and did not bar his claim, it may still be regarded as reducing damages.[9] This also applies to fault in failing to mitigate the damage.[10]

597. It has often been laid down in England [11] that where the negligence of each party is distinct and separable, liability attaches always to that fault which occurred last in point of time. To say that the defender will be responsible if he could by reasonable care have avoided the accident notwithstanding the pursuer's negligence, is simply a less precise presentment of the same view.[12] Although this doctrine has been reiterated in Scotland,[13] it is submitted that it is inconsistent with authority in this country. In accordance with general principles,[1] everything depends upon what is the proximate cause, though of course there may be more than one.[2] If the first negligence is the *causa proxima*, the second is disregarded, as being merely the *causa sine qua non*.[3] Chronology is thus immaterial wherever one fault outweighs the other in importance, though no doubt it may be the deciding factor if they are of equal moment. Thus, when a camel's back is broken in Scotland, liability should not attach to the man whose negligence allowed the last straw to be added, but to the first who laid an extraordinary burden upon it. Two cases may be cited in which pursuers have succeeded when their negligence was subsequent to and separable from the defender's.[4] A railway company was held responsible for not protecting a dangerous level-crossing, although the injured person did not observe due care.[5] So also a shipowner had to pay damages for a master's fault in casting off a bow hawser before seeing the gangway withdrawn, in spite of the fact that thereafter a passenger stupidly insisted in trying to force his way on board in the face of the warnings of the crew.[6] Again, there is old authority for the view that a drunk man may recover from a heritor who has dug a pit close to the highway.[7] It was probably on this ground that in the early Scots cases trespassers [8] and careless servants [9] were not deprived of remedy, and that now the negligence of a parent in not restraining his child will not exonerate a defender whose property is unsafe.[10]

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[1] See, *e.g.*, per Lord Mackenzie in *Pressley* v. *Burnett*, 1914 S.C. 874, at p. 881; per Lord Watson in *Wakelin* v. *London and South-Western Rly. Co.*, 1886, 12 App. Cas. 41, at p. 47, repeated by Lord Finlay in *Craig* v. *Glasgow Corporation*, 1919 S.C. (H.L.) 1, at p. 8.

[2] *Donald* v. *Clyde Navigation Trs.*, 1875, 2 R. 813.

[3] See per Lord Shaw in *Owners of* "*Bogota*," *infra*, at p. 77.

[4] Per Lord Wood in *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160, at p. 167.

[5] *Carse* v. *North British Steam Packet Co.*, 1895, 22 R. 475; see also *Morrison* v. *M'Ara*, 1896, 23 R. 564; *Barty* v. *Harper & Sons*, 1922 S.C. 67.

[6] 1842, 10 M. & W. 546.

[7] *Allan* v. *M'Leish*, 1819, 2 Mur. 158.

[8] *Admiralty Commissioners* v. *S.S.* "*Volute*," [1922] 1 A.C. 129; *Owners of* "*Bogota*" v. *Owners of* "*Alconda*," 1924 S.C. (H.L.) 66.

[9] *Allan* v. *M'Leish*, *supra*; per Lord Wood in *M'Naughton*, *supra*, at p. 167; approved by Lord Pres. Inglis in *Florence* v. *Mann*, 1890, 18 R. 247, at p. 249; *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915.

[10] *Moffat & Co.* v. *Park*, 1877, 5 R. 13, per Lord Gifford at pp. 17, 18, Lord Justice-Clerk Moncreiff at p. 19; *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21.

[11] *E.g. Admiralty Commissioners* v. *S.S.* "*Volute*," [1922] 1 A.C. 129; *Cooper* v. *Swadling*, 1929, 46 T.L.R. 73; see Beven i. 173, and 1930, S.L.T. (News) 25.

[12] See, *e.g.*, *Owners of S.S.* "*Bogota*" v. *Owners of S.S.* "*Alconda*," *supra*.

[13] *E.g.*, per Lord Pres. Clyde in *Robinson* v. *Hamilton* (*Motors*), *Ltd.*, 1923 S.C. 838, at p. 842.

598. When the rule of the last negligent act is to be applied, as for instance when there is no better way of finding the *causa proxima*, certain limitations must be kept in mind. The chief difficulty arises where there has been an act of continuing negligence on one side. As a general rule, allowing property to be in an unsafe condition is not regarded as involving liability for reckless interference with it, although the defender's fault often persists after the pursuer's has ceased, and right up to the moment of injury. Thus, negligently allowing a very young child to wander unattended is not the last act as compared with the fault of those in charge of a vehicle,[11] or who have left unwatched a dangerous machine.[1] In the same way, being on the wrong side of the road [2] or channel [3] is not the last act as compared with faulty management of a colliding object. This has been justified by the Court of Session [4] on the ground that the English principle only applies where the person said to be last negligent had an opportunity after the other's fault of correcting his own carelessness and avoiding the accident. Thus where a woman collided with a tramway car through her own fault, and was hurt owing to the absence of side guards (which was assumed to be negligence), the company was assoilzied. As Lord Dunedin pointed [5] out, "there was no room for a subsequent act of volition, because nobody says that, after the lady stepped into the track of the tramway lines, it would have been possible for the tramway company to have let down a side guard." On the other hand, Lord Sumner, in the Privy Council,[6] has taken a different view, namely, that antecedent fault as to the condition of a vehicle only falls to be regarded at the point of time at which danger arises. Thus a man with bad brakes is last negligent if he fails to stop after the pursuer gets in the way. As between two continuing courses of negligence this test is obviously impracticable, and the *causa proxima* must be determined upon general principles.[7] It is, of course, clear that the last act must be the last preceding the *injuria*, and not the last preceding the *damnum*. Thus, in the tramway case above mentioned,[4] liability was avoided on the alternative ground that the absence of side guards affected only the lesion and not the contact.[8] It is submitted that the best solution of all these difficulties is to leave the English Courts to develop their own technical rules, and to apply rigidly the general test which has been the foundation of Scots law for so long, namely, what in all the circumstances would a jury regard as the real effective proximate cause of the accident, irrespective of chronological sequence.[9] The English test may be helpful in some cases, but in others it is not so.

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[1] See per Lord Justice-Clerk Inglis and Lord Wood in *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160, at pp. 164, 166, 167; per Lord Pres. Clyde in *Barty* v. *Harper & Son*, 1922 S.C. 67, at p. 69.

[2] See per Lord Pres. Clyde in *Robinson* v. *Hamilton (Motors) Ltd.*, 1923 S.C. 838, at p. 842.

[3] See per Lord Mackenzie in *Gibb* v. *Edinburgh Tramways Co.*, 1913 S.C. 541, at p. 547.

[4] See also *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915; 1925 S.C. (H.L.) 41.

[5] *Gilchrist* v. *Ballochney Rly. Co.*, 1850, 12 D. 979.

[6] *Monaghan* v. *Buchanan*, 1886, 13 R. 860.

[7] Per Lord Pres. Boyle in *Hislop* v. *Durham*, 1842, 4 D. 1168 (overruled on another point in *Prentices* v. *Assets Co.*, 1890, 17 R. 484); per Lord Cockburn in *Neilson* v. *Rodger*, 1854, 16 D. 603, at p. 606; cp. per Lord Justice-Clerk Macdonald in *Sommerville* v. *Hardie*, 1896, 14 R. 58, at p. 61.

[8] See para. 547, *supra*.

[9] *Sword* v. *Cameron*, 1839, 1 D. 493 (explained by Lord Justice-Clerk Hope in *Dixon* v. *Rankin*, 1852, 14 D. 420, at p. 425); *Whitelaw* v. *Moffat*, 1849, 12 D. 434; see also *Paterson* v. *Wallace & Co.*, 1854, 1 Macq. 748.

[10] Per Lord Sumner in *Taylor* v. *Glasgow Corporation*, 1922 S.C. 1, at p. 14.

[11] *Taylor* v. *Dumbarton Tramways Co.*, 1918 S.C. (H.L.) 96.

599. Incapacity of pursuers gives rise to special considerations.[10] Disability due to deafness,[11] blindness,[12] and old age [13] is practically disregarded, as failure to comprehend danger which is due to these causes cannot be fault.[14] The extent to which contributory negligence can be pleaded when children have been injured has never been definitely settled.[1] In the early cases [2] the logical and common-sense view was taken that either a child was able to look after itself or it was not. If it was, then fault could be ascribed to it; if it was not, the parents were contributorily negligent in not supervising it. An infant was thus in the same legal position as an adult. In this view, the liability of defenders rested upon general principles which were both equitable and clear. More recently, however, the Courts have refused to lay down that at any age a child is definitely responsible, or a father freed from his natural duty of protection. Everything now depends upon what view the jury take of the capabilities of the injured infant [3] in the emergency which has occurred. With regard, first, to children themselves, it has been held in particular cases that those aged 22 months,[4] 2½ years,[5] 4 years,[6] and 5 [7] and 6 [8] years were not in fact capable of contributory negligence, while the opposite conclusion was reached in other cases as to children of 4,[9] 5,[10] and 6.[11] Conflicting opinions have been expressed as to whether disobedience of domestic instructions can be founded on by a defender.[12] With regard, second, to parents, in early times their duties were onerous and included the keeping from danger of boys of 9.[13] This is not now the law. It has been said to be fault to allow infants under 3 to wander about themselves [14] or under the guardianship of other young children,[15] but this has been negatived where the victim was 4,[16] 5,[17] or 6.[18] Merely to allow children to play as usual is perhaps not contributory negligence.[19]

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[1] *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149.

[2] *Barty* v. *Harper & Sons*, 1922 S.C. 67.

[3] *Owners of S.S.* "*Bogota*" v. *Owners of S.S.* "*Alconda*," 1924 S.C. (H.L.) 26.

[4] *Gibb* v. *Edinburgh Tramways Co.*, 1913 S.C. 541.

[5] At p. 547.

[6] *British Columbia Rly. Co.* v. *Loach*, [1916] A.C. 719.

[7] *Brownlie & Son* v. *Mags. of Barrhead*, 1923 S.C. 915; affd. 1925 S.C. (H.L.) 41.

[8] See per Lord Pres. Dunedin at p. 546.

[9] Lord Mackenzie seems to recognise in *Gibb*, *supra*, at p. 547, that one cannot found on any fault subsequent to what was the proximate cause of the accident.

[10] Glegg, p. 53; Guthrie Smith, pp. 143–147; Beven, i. 183.

[11] *Clerk* v. *Petrie*, 1879, 6 R. 1076; *M'Kechnie* v. *Couper*, 1887, 24 S.L.R. 252.

[12] *M'Kibbin* v. *Glasgow Corporation*, 1920 S.C. 590.

[13] *Clerk*, *supra*.

[14] See per Lord Justice-Clerk Moncreiff in *Campbell*, *supra*, at p. 153.

600. There are certain exceptional cases in which actions which would ordinarily be regarded as contributory negligence do not bar a claim, on the ground that they are really attributable to the defender's initial fault in putting the pursuer in a position of difficulty. Three types of such actions may be distinguished, according to whether they are (*a*) instinctive (*i.e.* without thinking) in the face of an immediate peril to self or companion, or (*b*) precipitate (*i.e.* without proper consideration) in an "agony," or (*c*) deliberate after being misled. Under the first head claims have been held good for injury caused to those in fear of their lives by jumping off the raised end of a drawbridge,[1] getting over a fence to avoid a runaway horse,[2] and driving off an invading boar,[3] and also for injury to a child creeping from under a lorry negligently started.[4] In the same way damages have been recovered for injury received through having attempted to save a friend from a railway train [5] or a runaway wagon.[6] But no one can recover if he has once emerged safely from danger and then voluntarily gone back into it.[7] The "agony rule" has recently been discussed in the House of Lords with reference to collisions at sea,[8] but it applies to road collisions also.[9] Lastly, a pursuer is not barred by any actings of his which are directly due to the defender having deceived him, as for instance by exhibiting wrong lights,[10] or by driving on the wrong side of the road up to the last moment.[9]

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[1] See, however, per Lord Pres. Clyde in *Dumbreck, infra*, at p. 556.

[2] *E.g. Grant* v. *Caledonian Rly. Co.*, 1870, 9 M. 258, per Lord Ardmillan at p. 264.

[3] *Campbell* v. *Ord & Maddison*, 1873, 1 R. 149.

[4] *Greer* v. *Stirling Road Trs.*, 1882, 9 R. 1069.

[5] Per Lord Salvesen in *Hardie* v. *Sneddon*, 1917 S.C. 1, at p. 5.

[6] *M'Gregor* v. *Ross*, 1883, 10 R. 725; *Hamilton* v. *Hermand Oil Co.*, 1893, 20 R. 995; *Dumbreck* v. *Addie & Sons' Collieries*, 1928 S.C. 547, per Lord Pres. Clyde at p. 556.

[7] *Haughton* v. *North British Rly. Co.*, 1892, 20 R. 113; see also *Gibson* v. *Glasgow Police Commissioners*, 1893, 20 R. 466.

[8] Per Lord Pres. Dunedin in *Holland* v. *Lanarkshire District Committee*, 1909 S.C. 1142, at p. 1148; cp. Lord Johnston at p. 1148.

[9] *Campbell, supra*; *Cass* v. *Edinburgh Tramways Co.*, 1909 S.C. 1068.

[10] *Plantza* v. *Glasgow Corporation*, 1910 S.C. 786; *Gibson, supra.*

[11] *Grant, supra*; *Fraser* v. *Edinburgh Tramways Co.*, 1882, 10 R. 264.

[12] Per Lord Pres. Clyde in *Dumbreck, supra*, at p. 556; cp. per Lord Johnston in *Holland, supra*, at p. 1148.

[13] Per Lord Justice-Clerk Hope in *Lumsden* v. *Russell*, 1856, 18 D. 468, at p. 469; see also per Lord Young in *Ross* v. *Keith*, 1888, 16 R. 86, at p. 91, and per Lord Justice-Clerk Macdonald in *Royan* v. *M'Lennans*, 1889, 17 R. 103, at p. 104.

[14] *Taylor* v. *Dumbarton Tramways Co.*, 1918 S.C. (H.L.) 96, per Lord Chancellor Finlay, Lords Haldane and Shaw at pp. 101, 103, 105, and 107.

[15] *Davidson* v. *Monklands Rly. Co.*, 1855, 17 D. 1038; *Moran* v. *Waddell*, 1883, 11 R. 44; *Davidson* v. *Sprengel*, 1909 S.C. 566; *Hardie, supra.*

[16] *Campbell, supra*; *Hamilton, supra*; per Lord Young in *Ross, supra*, at p. 731; per Lord Pres. Clyde in *Dumbreck, supra*, at p. 556.

[17] Per Lord Pres. Clyde in *Dumbreck, supra.*

[18] Per Lord Johnston in *Holland, supra.*

[19] Per Lord Justice-Clerk Moncreiff in *Campbell, supra*, at p. 154; but cp. *Taylor, supra.*

601. It has often been said that contributory negligence is only relevant as an answer to defender's negligence, and that accordingly no question of the former can arise until the latter is established.[11] This is perhaps borne out by the old procedure of allowing a counter-issue.[12] But while theoretically sound this is a deceptive doctrine in practice. In some cases at any rate it seems that contributory negligence is in issue at an earlier stage, namely, in considering whether any duty is made out. For if there would have been no damage without contributory negligence there is no duty to take precautions.[13] For this reason failure to fence an obvious danger is not negligence at all, and the defender does not need to plead contributory negligence, nor is the onus on him to prove it.[14] It may be, however, that this and similar cases depend on the doctrine of *volenti non fit injuria*, which is not always easy to distinguish from contributory negligence.[15]

602. What amounts to contributory negligence is always a question of circumstances, just as is what amounts to negligence.[16] "Contributory negligence can only be judged of with reference to the particular facts of each case,"[1] and accordingly the Court is very reluctant ever to dispose of an action without proof on the ground that the pursuer's averments disclose that the accident was due to his own fault.[2] Typical examples of contributory negligence are standing near while an amateur tries to hit a nail on the head,[3] and allowing an infant to run about near an unprotected well shaft.[4] It is always difficult to prove this defence against a child. For instance a boy of 7 is not contributorily negligent if he swings on a gate,[5] and the same has even been held in the Outer House of a boy of 12 picking up a bomb.[6]

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[1] *Hunter* v. *Edinburgh and Glasgow Union Canal Co.*, 1836, 14 S. 717.

[2] *Ramage* v. *Carswell* (O.H.), 1918, 2 S.L.T. 62.

[3] *Hennigan* v. *M'Vey*, 1882, 9 R. 411.

[4] *Morrison* v. *M'Ara*, 1896, 23 R. 564.

[5] *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118.

[6] *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.*, 1897, 24 R. 1001.

[7] *Wilkinson*, *supra*; *Macdonald* v. *Macbrayne, Ltd.*, 1915 S.C. 716.

[8] *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21.

[9] *Wallace* v. *Bergius*, 1915 S.C. 205.

[10] *Pressly* v. *Burnett*, 1914 S.C. 874.

[11] See, *e.g.*, *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118, at p. 1125, seemingly approved by Lord Pres. Dunedin in *Gibb* v. *Edinburgh Tramways Co.*, 1913 S.C. 541, at p. 545; per Lord Kinnear in *Hastie* v. *Mags. of Edinburgh*, 1907 S.C. 1102, at p. 1106; see also Guthrie Smith, pp. 139, 140.

[12] *Donald* v. *Clyde Navigation Trs.*, 1875, 2 R. 813.

[13] See para. 546, *supra*.

[14] *Murray* v. *Lanark Road Trs.*, 1888, 15 R. 737; *Shillinglaw* v. *J. G. & R. Turner*, 1925 S.C. 807.

[15] See Guthrie Smith, pp. 139, 363.

[16] *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118, at p. 1125.

SUBSECTION (2).—Volenti non fit injuria.

603. A defence sometimes confused with the last is that of *volenti non fit injuria*,[7] which bears the same relation to contributory negligence as malice bears to primary negligence. The distinguishing feature in each case is the presence or absence of deliberate intention.[8] If the person hurt took the risk of injury wilfully (and not merely carelessly) the maxim applies, and damages cannot be recovered. The ratio is not quite clear, but it is either personal bar [9] or exclusion of causal connection between the defender and the loss.[10] *Volenti non fit injuria* is most commonly pleaded by landlords against tenants, and by masters against servants, and its application seems to be the same in either case.[11] It is also the basis of the doctrine of "common employment."[12] But it is a perfectly general principle, and may be invoked in any circumstances. Thus actions for damages have failed on this ground where a pursuer suffered injury through forcing his way along a road which had been closed,[13] or bought a house situated immediately underneath a mass of unstable debris.[14]

604. In order to establish the defence of *volenti non fit injuria* two things must be made out: (1) that the injured person was *sciens*, and (2) that he was also *volens*. It is obvious that he cannot be said to take a risk voluntarily unless he knows of it. Thus a notice warning the public of a danger is not effective to avoid liability if the pursuer had no opportunity of reading it.[1] How far it exonerates a defender in any circumstances is a difficult question, and it certainly does not do so in the case of a moving peril, such as a vicious dog.[2]

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[1] Per Lord Mackenzie in *Watt* v. *Glasgow Corporation*, 1919 S.C. 300, at p. 310; approved in *Buchanan* v. *Glasgow Corporation*, 1921 S.C. 658.

[2] *Toal* v. *North British Rly. Co.*, 1908 S.C. (H.L.) 29; *Campbell* v. *United Collieries*, 1912 S.C. 182; *Baikie* v. *Glasgow Corporation*, 1919 S.C. (H.L.) 13; *Jackson* v. *Glasgow Corporation*, 1928 S.C. 37; cp. *Driscoll* v. *Commissioners of Partick*, 1900, 2 F. 368 (but see *Baikie, supra*); *M'Sherry* v. *Glasgow Corporation*, 1917 S.C. 156, and *Hardie* v. *Sneddon*, 1917 S.C. 1.

[3] *Gray* v. *Douglas*, 1890, 17 R. 858.

[4] *Hardie, supra.*

[5] *Cormack* v. *Wick School Board*, 1889, 16 R. 812.

[6] *Davidson* v. *Mags. of Aberdeen*, 1919, 2 S.L.T. 213.

[7] See Glegg, pp. 450, 563; Guthrie Smith, pp. 139, 363; Bell's Prin., s. 547A (6); Beven, i. 787.

[8] See Guthrie Smith, p. 139.

[9] See Rankine on Personal Bar, p. 87.

[10] See per Lord Justice-Clerk Inglis in *Birrell* v. *Anstruther*, 1866, 5 M. 20, at p. 23.

[11] Per Lord Kinnear in *Cameron* v. *Young*, 1907 S.C. 475, at p. 483.

[12] See para. 606, *infra*.

[13] *Crombie* v. *Balfour*, 1838, M'F. 155.

[14] *Thomson* v. *Gray*, 1842, 5 D. 377.

605. In what circumstances a man is to be held to be *volens* has been the subject of much discussion. According to the common law of Scotland,[3] "if a servant, in the face of a manifest danger, chooses to go on with his work, he does so at his own risk, and not at the risk of his master." An employee who did not leave, as he was entitled to do if dissatisfied, was formerly deemed to be willing to take his chance. The case of a tenant was *a fortiori* of that of a servant.[4] In 1891, however, the House of Lords laid down [5] that in English law the maxim must be differently interpreted. The fact of continuance after observation and protest did not, it was held, establish willingness, but was only one element in determining that question. As there is generally no other evidence on the matter the natural result has been that the plea could almost never be sustained. This doctrine is quite inconsistent with that of common employment,[6] as there the mere fact of continuance is a complete bar. Although contrary to the law of Scotland as laid down by Lord President Inglis,[7] the English rule has been adopted as affecting both servants [8] and tenants.[9] Its development may be traced under the heads MASTER AND SERVANT and LEASE.

606. The most striking application of the maxim *volenti non fit injuria* is to be found in the doctrine of common employment.[10] According to this no one can claim damages in respect of the fault of another who is a fellow-servant of his working for the same master, for the law presumes that he took the risk of his companion's negligence.[11] This restriction of an employer's liability is an American invention,[12] which, after being misunderstood in England,[13] was extended to Scotland by the House of Lords.[14] The extent to which it was there carried appears to have been repudiated in the country of its origin [15] and was nullified in Britain by the intervention of Parliament. Had it not been for the application of English principles[1] there would have been no need for the Employers' Liability Act north of the Tweed. Once the Scots Courts had adopted the general maxim *respondeat superior*[2] they applied it without fear or favour whether the injured person was an employee or a member of the public. For there is no reason in principle to make any distinction. A servant is often just as much a stranger to a fellow-servant as to any outsider. The English Courts, on the other hand, attempted to modify the liability of defenders by excluding claims by *collaborateur*. But the doctrine of common employment as expounded in the House of Lords[3] is radically inconsistent with *respondeat superior*, as it depends on the idea that a master's only duty to his servant is to employ other competent servants. If this is so, his liability to the general public ought to be restricted accordingly. Ultimately English lawyers found that they had gone too far in the other direction (*i.e.* in favour of the employer), and the pendulum was swung back in 1891[4] by arbitrarily restricting the scope of the defence *volenti non fit injuria* so as to deprive it of all real content. The principle of common employment was only accepted here after long resistance,[5] but by 1891 it seems to have been assumed that further protest was useless,[6] and that Scotland must adopt the English rule. Early Scots law was perfectly reasoned and consistent. It was anxious to avoid the doctrine of common employment, but being forced to accept it, recognised at once that if a man was *volens* when he remained at work with a fellow-servant, he was also *volens* when he remained at work alone.[7]

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[1] *Aktieselskabet Dampskibet Forto* v. *Orkney Harbour Commissioners*, 1915 S.C. 743.

[2] *Smillies* v. *Boyd*, 1886, 14 R. 150.

[3] Per Lord Justice-Clerk Inglis in *Crichton* v. *Keir & Crichton*, 1863, 1 M. 407, at p. 411; cp. per Lord Mackenzie in *Sword* v. *Cameron*, 1839, 1 D. 493, at p. 499.

[4] *Birrell* v. *Anstruther*, 1866, 5 M. 20; *Webster* v. *Brown*, 1892, 19 R. 765.

[5] *Smith* v. *Baker & Sons*, [1891] A.C. 325.

[6] See para. 606, *infra*.

[7] *MacNeill* v. *Wallace*, 1853, 15 D. 818; *Crichton*, *supra*; *Stewart* v. *Coltness Iron Co.*, 1877, 4 R. 952; *M'Gee* v. *Eglinton Iron Co.*, 1883, 10 R. 955.

[8] *Wallace* v. *Culter Paper Mills Co.*, 1892, 19 R. 915; *Robertson* v. *Primrose & Co.*, 1910 S.C. 111.

[9] *Cameron* v. *Young*, 1907 S.C. 475; cp. *Smith* v. *Maryculter School Board*, 1898, 1 F. 5.

[10] See Glegg, p. 466 ff.; Guthrie Smith, p. 339 ff.; Bell's Prin., s. 547A (6); Beven, i. 816 ff.

[11] *Bartonshill Coal Co.* v. *Reid*, 1858, 3 Macq. 266; *Wilson* v. *Merry & Cunningham*, 1868, 6 M. (H.L.) 84.

[12] *Farwell* v. *Boston and Worcester Railroad Corporation*, 45 Mass. (4 Met.) 49; also in 3 Macq. 316; 2 J. of Jur. 415.

[13] Guthrie Smith, pp. 339–346.

[14] *Bartonshill Coal Co.*, and *Wilson* v. *Merry & Cunningham*, *supra*.

[15] *Chicago, Milwaukee, and St. Paul Railroad Co.* v. *Ross*, 112 U.S. 377; Guthrie Smith, pp. 346, 347.

SECTION 6.—ONUS OF PROOF.

SUBSECTION (1).—*In General.*

607. That the onus of the proof of negligence is on the pursuer is such trite law that it has never been the subject of express decision.[8] The dicta are innumerable,[9] and among the earliest may be quoted one of Lord Meadowbank in 1838.[10] "In general," he says, "the party alleging damage is required to prove the damage to have occurred from the laches of the other party." (Exceptional cases, where negligence is presumed from circumstances unless excluded by the delinquent, will be dealt with later.[1]) But the innocence of a defender is not so deeply seated as that of a panel, and it is easier to make out civil than criminal negligence.[2] In so far as any general rules can be laid down as to the shifting [3] and discharging [4] of onus, these will be found in the undernoted House of Lords decisions. Contributory negligence is subject to the same presumptions as primary negligence.[5] The question of the proof and presumption of *damnum* has already been treated.[6]

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[1] See also as to contributory negligence of servants, *supra*, para. 597, note 9.

[2] They only did so with hesitation; see, *e.g.*, per Lord Chief Commr. Adam in *Miller* v. *Harvie*, 1827, 4 Mur. 385, at p. 389, and per Lord Justice-Clerk Moncreiff in *Adams* v. *Glasgow and South-Western Rly. Co.*, 1875, 3 R. 215, at p. 221.

[3] *Wilson* v. *Merry & Cunningham*, 1868, 6 M. (H.L.) 84, per Lord Chancellor Cairns at p. 89.

[4] *Smith* v. *Baker & Sons*, [1891] A.C. 325.

[5] *Sword* v. *Cameron*, 1839, 1 D. 493; *Dixon* v. *Rankin*, 1852, 14 D. 420; *Baird* v. *Addie & Miller*, 1854, 16 D. 490; *Brownlie* v. *Macaulay*, 1860, 22 D. 975; *Finnigan* v. *Peters*, 1861, 23 D. 260; *Derby* v. *Duncan*, 1861, 23 D. 529; *Somerville* v. *Gray*, 1863, 1 M. 768; see per Lord Justice-Clerk Moncreiff in *Gregory* v. *Hill*, 1868, 8 M. 282, at p. 285.

[6] See para. 590, *supra*.

[7] See per Lord Medwyn in *Dixon*, *supra*, at p. 426; also Lord Justice-Clerk Hope at p. 425.

[8] See Guthrie Smith, p. 32; Beven, i. 120 ff.; *Alexander* v. *Phillip*, 1899, 1 F. 985.

[9] *E.g.* per Lord Pres. Inglis in *Grant* v. *Caledonian Rly. Co.*, 1870, 9 M. 258, at p. 271.

[10] *Lyon* v. *Lamb*, 1838, 16 S. 1188, at p. 1195; see also per Lord Chief Commr. Adam in *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261, at p. 269.

SUBSECTION (2).—Res ipsa loquitur.

608. There are, however, certain circumstances which seem so clearly to infer fault against a defender that the onus of proof shifts to him upon his mere admission of the nature of the accident.[7] Unless he can exclude negligence he will then be liable. A typical example is where new works give way for no apparent reason.[8] Sometimes it is impossible to rebut such implication, even by proving generally that all due care was taken, if the subject is so destroyed as to be incapable of examination. Thus where a dam only four months old was swept away the Court held that an absolute presumption of fact had been established that it was badly constructed.[9] Short of this, however, there is a large class of case in which the defender may affirm his innocence. He must do so wherever it can be said that *res ipsa loquitur*, meaning, of course, that the *res* speaks "so as to throw the inference of fault upon [him]." [10] The maxim does not seem to have been used in early times, but the idea is ancient, although the House of Lords refuse to rank it as a principle of law.[11]

609. It is difficult to define the class of case in which it applies. This depends, it has been said,[12] "upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence." In Lord Shaw's [13] epigram, "a thing tells its own story—not always but sometimes." A well-known English dictum[1] to the following effect has recently found acceptance in Scotland.[2] "Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It would seem, then, that there are three essentials. The *species facti* must be (1) unusual, (2) unexplained, and (3) unlikely to be accidental.[3] As to the first, it has been said[4] that there must be "some occurrence out of the usual," and so the maxim does not apply to the bursting of water-pipes[5] in cold weather, or the forming of ice in the streets.[6] Again, "the *res* can only speak so as to throw the inference of fault upon the defender in some cases where the exact cause of the accident is unexplained."[7] Accordingly there is no room for it if crystallisation of iron is the root of the trouble.[8] Lastly, there are many cases where both these elements are present, and yet there is no presumption of fault because the facts are equally consistent with accident, as when a motor bus swerves unaccountably.[9] Thus it is not enough that the facts are relevant to infer negligence; they must more or less definitely point to it.[10]

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[1] See next para.

[2] Per Lords Ardmillan, Deas, and Neaves in *Grant* v. *Caledonian Rly. Co.*, 1870, 9 M. 258, at pp. 265, 267, 269.

[3] *S.S.* "*Baron Vernon*" v. *S.S.* "*Metagama*," 1928 S.C. (H.L.) 21.

[4] *Craig* v. *Glasgow Corporation*, 1919 S.C. (H.L.) 1.

[5] See para. 595, *supra*.

[6] See para. 582, *supra*.

[7] See Glegg, pp. 327, 417 (approved by Lord Justice-Clerk Scott-Dickson in *Milliken* v. *Glasgow Corporation*, 1918 S.C. 857, at p. 862); Guthrie Smith, p. 33; Beven, i. 122; Bell's Prin., s. 547A (6).

[8] *Cook* v. *Duncan*, 1857, 20 D. 180; *Kerr* v. *Earl of Orkney*, 1857, 20 D. 298.

[9] *Kerr*, *supra*, see per Lord Ardmillan at p. 301.

[10] Per Lord Adam in *Milne* v. *Townsend*, 1892, 19 R. 830, at p. 836.

[11] See per Lords Dunedin and Shaw in *Ballard* v. *North British Rly. Co.*, 1923 S.C. (H.L.) 43, at pp. 53, 56.

[12] Per Lord Dunedin in *Ballard* v. *North British Rly. Co.*, 1923 S.C. 34, at p. 53; see also per Lord Gifford in *Moffat & Co.* v. *Park*, 1877, 5 R. 13, at p. 17.

[13] *Ballard*, *supra*, at p. 56.

610. Early decisions seem to go very far in holding negligence to be presumed from the breakdown of a vehicle,[11] the collapse of scaffolding,[12] the parting of a rope,[13] or the falling of tackle.[14] In the first instance this has now been definitely repudiated,[9] and an explanation of the others has been offered.[15] It was only held, it is said, that where some defect in property is proved, the pursuer need not shew precisely what the defect was. But this is hardly reconcilable with the general statement by Lord Neaves[16] that "when a defect arises without any apparent cause, some onus seems to lie upon a proprietor to shew that the insufficiency was not owing to his own negligence." Lord Dunedin[1] has recently revived the old cases by suggesting that *res ipsa loquitur* applies more easily between master and servant. The dictum quoted,[2] however, related to neighbours, and perhaps the truth is that the law has changed somewhat.[3] The sympathy of the Court may be now more often than formerly with defenders, a factor which may have an unconscious effect in questions of onus. It is only exceptionally to-day that a defender must bear the burden.

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[1] Per Erle C.J. in *Scott* v. *London and St. Katherine's Docks Co.*, 1865, 3 H. & C. 596, at p. 601.

[2] Per Lord Salvesen in *Milliken* v. *Glasgow Corporation*, 1918 S.C. 857, at p. 867; Lord Chancellor Cave, Lords Dunedin and Shaw in *Ballard* v. *North British Rly. Co.*, 1923 L.C. (H.L.) 43, at pp. 48, 55, 56.

[3] *Multo magis* contributory negligence.

[4] Per Lord Shaw in *Ballard, supra*, at p. 56.

[5] *Moffat & Co.* v. *Park*, 1877, 5 R. 13, at p. 17.

[6] *O'Keefe* v. *Edinburgh Corporation*, 1911 S.C. 18.

[7] Per Lord Adam in *Milne* v. *Townsend*, 1892, 19 R. 830, at p. 836, approved by Lord Dunedin in *Ballard, supra*, at p. 54; see also per Lord Neaves in *Campbell* v. *Kennedy*, 1864, 3 M. 121, at p. 125.

[8] *Milne* v. *Townsend*, 1892, 19 R. 830, at p. 836.

[9] *Henderson* v. *Mair*, 1928 S.C. 1.

[10] See per Lord Dunedin in *Ballard, supra*, at p. 54.

[11] *Lyon* v. *Lamb*, 1838, 16 S. 1188; see also *Anderson* v. *Pyper & Co.*, 1820, 2 Mur. 261.

[12] *Macaulay* v. *Buist & Co.*, 1846, 9 D. 245, approved by Lord Justice-Clerk Scott-Dickson in *Milliken* v. *Glasgow Corporation*, 1918 S.C. 857, at p. 862, and Lord Dunedin in *Ballard, supra*, at p. 53; see also Beven, i. 132; *Cook* v. *Duncan*, 1857, 20 D. 180.

[13] *Fraser* v. *Fraser*, 1882, 9 R. 896; *cf.* per Lord Morison in *Oliver* v. *Saddler & Co.*, 1928 S.C. 608, at p. 610.

[14] *Walker* v. *Olsen*, 1882, 9 R. 946.

[15] Per Lord Justice-Clerk Moncreiff in *Macfarlane* v. *Thomson*, 1884, 12 R. 232, at p. 235, accepted by Lord Dunedin in *Ballard, supra*; *cf.* Beven, i. 132, 133.

[16] *Campbell* v. *Kennedy*, 1864, 3 M. 121, at p. 125.

611. Such cases have recently been expounded both in the House of Lords[4] and in the Court of Session.[5] The maxim applies where the coupling of a railway wagon breaks,[6] a horse bolts,[7] or is left unattended,[8] or a moving vessel collides with a stationary one.[9] There are dicta that if a vehicle runs down a pedestrian there is a presumption of fault against the former.[10] Where the pedestrian is run down from behind this may be good law,[11] but as a general principle it has been departed from,[12] and the contrary is laid down every day to juries, namely, that the injured must prove their case affirmatively. The maxim has been invoked, somewhat unadvisedly it is submitted, to presume negligence from the fact of lateral movement of a lorry.[13] It has most sensibly been held to apply where a defender destroyed the part of his plant which had given way,[14] conformably to the good old rule that *omnia præsumuntur contra spoliatorem.* It cannot be said that *res ipsa loquitur* when an accident occurs in an "infallible" system, although such an argument is frequently advanced.[15]

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[1] *Ballard* v. *North British Rly. Co.*, 1923 S.C. (H.L.) 43, at p. 53.

[2] *Campbell* v. *Kennedy*, 1864, 3 M. 121, at p. 125.

[3] See Glegg, p. 416; per Lord Chancellor Campbell in *Wemyss* v. *Mathieson*, 1861, 4 Macq. 215, at p. 222; *Gavin* v. *Rogers*, 1889, 17 R. 206; *Milne* v. *Townsend*, 1892, 19 R. 830, at p. 836, for modern standpoint.

[4] *Ballard, supra*; see also *Henderson* v. *Mair*, 1928, S.C. 1.

[5] *Mullen* v. *Barr & Co.*, 1929 S.C. 461.

[6] *Ballard, supra.*

[7] *Snee* v. *Durkie*, 1903, 6 F. 42; approved by M'Cardie J. in *Gayler & Pope* v. *Davies*, [1924] 2 K.B. 75, but cp. cases there cited.

[8] *Hendry* v. *M'Dougall*, 1923 S.C. 378, per Lords Ormidale and Hunter at pp. 384, 386.

[9] *Wylie* v. *Caledonian Rly. Co.*, 1871, 9 M. 463, per Lord Kinloch at p. 470; *Stephen* v. *Allan Line*, 1912 S.C. (H.L.) 69.

[10] Per Lord Justice-Clerk Moncreiff in *Clerk* v. *Petrie*, 1879, 6 R. 1076, at p. 1077; per Lord Justice-Clerk Macdonald in *Snee, supra*, at p. 45; see also *Anderson, infra.*

[11] *Anderson* v. *Blackwood*, 1886, 13 R. 443.

[12] *Alexander* v. *Phillip*, 1899, 1 F. 985.

[13] *Milliken* v. *Glasgow Corporation*, 1918 S.C. 857, at p. 867; cp. *Hanson* v. *Lancashire and Yorkshire Rly. Co.*, 1872, 20 W.R. 297.

[14] *Rooney* v. *Allan*, 1883, 10 R. 1224.

[15] Per Lord Chancellor Herschell in *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Rly. Co.*, 1893, 20 R. (H.L.) 35, at p. 39; per Lord Anderson in *Mullen* v. *Barr & Co.*, 1929 S.C. 461, at p. 480.

NEGOTIABLE INSTRUMENTS.

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SECTION 1.—INTRODUCTORY.

612. The term negotiable instruments is applied to such documents, evidencing an obligation to pay money, as, by statute or mercantile custom recognised in law, are transferable by delivery and entitle a *bona fide* holder for value to enforce the obligation notwithstanding any defect in the title of the transferor. Negotiable instruments, by virtue of these attributes, are on the same footing as ordinary currency and are subject to the same rules as money.[1] The law as to negotiable instruments is part of the law merchant. Upon the general question of negotiability the law of Scotland is the same as the law of England, and the authorities in the one country are treated as authorities in the other.[2]

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[1] *Fuentes* v. *Montes*, 1868, L.R. 3 C.P. 268, per Willes J. at p. 276; *Whistler* v. *Ferrier*, 1863, 14 C.B. N.S. 248, per Willes J. at pp. 257, 258; *Wookey* v. *Pole*, 1820, B. & Ald. 1, per Holroyd J. at p. 10.

[2] *M'Lean* v. *Clydesdale Bank*, 1883, 11 R. (H.L.) 1, per Lord Blackburn at p. 3; *cf.* per Lord Gifford in *Brown* v. *M'Connell*, 1876, 3 R. 788, as to the strong presumption that the rules and practice of the law merchant in Scotland are the same as in England.

SECTION 2.—DISTINCTIVE CHARACTERISTICS.

613. The distinguishing characteristics of negotiable instruments are two in number. (1) The right to the obligation contained in the instrument is transferred by the delivery of the instrument or, in certain cases, by delivery after indorsement. In the case of a non-negotiable document of debt, the legal title to the debt is transferable only by assignation, completed by intimation to the debtor; and the debt may be effectually assigned without any change in the possession of the document vouching it. In the case of a negotiable instrument, on the other hand, the obligation is incorporated in, and transferred with, the instrument by which it is evidenced, and no notice of the transfer need be given to the person liable in the instrument.[1] "The privilege of a negotiable instrument is that, when transferred, it passes in its own *corpus* the thing it represents without intimation."[2] (2) The holder for the time being, if he is a *bona fide* holder for value, acquires a title valid against all the world notwithstanding any defect in the title of the transferor or prior holders. The general rule of law is that no one can transfer a better title than he himself possesses: *nemo dat quod non habet.* But in the case of a negotiable instrument, any person in possession of it, even when he himself has no title and is acting in fraud of the true owner, may convey a good title in it by passing it over for value to one who takes it without knowledge of the want of title in the transferor. "It is of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority."[3] It is, in short, the peculiar privilege of a completely negotiable instrument that a *bona fide* holder for value is not prejudiced by defects in the title of the transferor and has a right to payment from the party liable on the instrument, according to its terms, free from defences or exceptions pleadable against any of his predecessors in title.

SECTION 3.—INSTRUMENTS LACKING ESSENTIALS OF FULL NEGOTIABILITY.

614. A document of title or instrument of transfer, if it lacks either of these characteristics, is not, in the proper legal sense, a negotiable instrument. "A contractual document may be such that, by virtue of its delivery, all the rights of the transferor are transferred to, and can be enforced by, the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor." [1] On this ground bills of lading, though commonly spoken of as negotiable, are outwith the category of fully negotiable instruments.

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[1] Bell's Prin., s. 1460.

[2] *Connal & Co.* v. *Loder*, 1868, 6 M. 1095, per Lord Neaves at p. 1102. Compare the statement in Pollock on Contract, 9th ed., p. 245: "The absolute benefit of the contract is attached to the ownership of the document which, according to ordinary rules, would be only evidence of the contract."

[3] *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, per Lord Herschell at p. 217.

615. A bill of lading possesses, indeed, by the law merchant and by statute, qualities resembling in some respects the qualities of a negotiable instrument. It is a document of title carrying with it the right to the possession of the goods described in it while these goods are on the voyage and up to the time of their being delivered to the person entitled to delivery under the contract; [2] the contract contained in the bill of lading is transferred, without notice to the person liable in the contract, by delivery or, as the case may be, by indorsement and delivery; and the transfer is effectual to transfer the ownership of the goods if made with that intention,[3] and to vest in the transferee "all rights of suit" as if the contract in the bill of lading had been made with himself.[4] Further, a transferee who takes a bill of lading in good faith and for value from a person with a good title can defeat a previous vendor's right of stoppage *in transitu*, and to that extent may acquire wider rights than those possessed by the transferor.

616. The rule that the transfer of a bill of lading by a person lawfully in possession of it as buyer or owner of the goods to a third person, who takes it in good faith and for value, has the effect of defeating the rights of the unpaid seller—a rule which had been established by decisions—is now statutory,[5] and has been extended by statute to other "documents of title" to goods within the meaning of that term in the Factors Acts.[6] Again, by statute, where a "mercantile agent" [7] is, with the consent of the owner, in possession of a bill of lading or other document of title [8] to goods, any sale, pledge, or other disposition made by him to a person acting in good faith and without notice of the agent's want of authority, in the ordinary course of his business as a mercantile agent, is as valid as if expressly authorised by the owner of the goods;[1] and a seller of goods who remains in possession of the bill of lading or other document of title to the goods, and a buyer who obtains possession with the consent of the seller, is in the position of a "mercantile agent" in this respect.[2]

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[1] *Simmons* v. *London Joint Stock Bank,* [1891] 1 Ch. 270, per Bowen L.J. at p. 294.

[2] *Barker* v. *Meyerstein,* 1870, 39 L.J. C.P. 187, at p. 191; L.R. 4 H.L. 307; *Hayman & Son* v. *M'Lintock,* 1907 S.C. 936, per Lord Dunedin at pp. 949, 950; per Lord M'Laren at p. 951.

[3] Such intention is a question of fact—*The "Prinz Adalbert,"* [1917] A.C. 586, per Lord Sumner at p. 589. A bill of lading may be transferred not by way of sale but by way of mortgage, pledge, or other security, the possession of the document being a possession of the goods—*Hayman & Son* v. *M'Lintock, supra,* at pp. 949, 950.

[4] Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1. In England, prior to this Act the indorsee could not sue on the contract in his own name.

[5] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47.

[6] Factors Act, 1889 (52 & 53 Vict. c. 45), made applicable to Scotland by the Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40). The expression "document of title" is, for the purposes of these Acts, defined in s. 1 (4) of the Factors Act, 1889. If the transfer was by way of sale, the right of stoppage *in transitu* is wholly defeated; if the transfer was by way of pledge or in security, the right of stoppage *in transitu* can only be exercised subject to the rights of the transferee (Sale of Goods Act, 1893, s. 47).

[7] Defined in s. 1 (1) of the Factors Act, 1889.

[8] Defined in s. 1 (4) of the Factors Act, 1889.

617. The effect of this statutory provision is that a buyer or seller or mercantile agent who, with the consent of the owner, is in possession of a bill of lading or other document of title is enabled to deal with the goods by way of sale or pledge as if he were himself the owner, unless the party with whom he deals knows that his authority is in fact restricted.[3] But where the transferor of a bill of lading or other document of title to goods has no title to the goods and no authority—either actual or ostensible by virtue of his being in possession as a buyer or seller of the goods or as a mercantile agent—to deal with them on behalf of the true owner, the transferee, even though taking the bill of lading or other document of title *bona fide* and for valuable consideration, acquires no rights against the true owner. In short—apart from the presumed authority conferred by statute on a buyer or seller of the goods and a mercantile agent—the power of the holder of a bill of lading or other document of title to goods to convey a title to the goods is no greater than it would be if the goods themselves were in his possession; that is to say, he can give no better title to a purchaser or pledgee than he has himself.[4] Hence a bill of lading or other instrument of transfer recognised by the Factors Acts as a document of title to goods lacks an essential quality of negotiability in that—subject to the exception[5] that one who takes it from a transferor with a good title is relieved from liability to a vendor's right of stoppage *in transitu*—the transferee does not get a better title than is possessed by the transferor.[1]

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[1] Factors Act, 1889, s. 2.

[2] Factors Act, 1889, ss. 8 and 9; Sale of Goods Act, 1893, s. 25. Possession of a bill of lading or other document of title to goods, with the consent of the owner, does not of itself confer an apparent authority to sell or pledge the goods where the possessor is not a mercantile agent or a seller or buyer who, under the statutory provisions, is for this purpose in the position of a mercantile agent—*Inglis* v. *Robertson & Baxter*, 1897, 24 R. 759; 1898, 25 R. (H.L.) 70.

[3] *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K.B. 225; *Weimar* v. *Harris*, [1910] 1 K.B. 285. The unauthorised transfer is effectual against the true owner on the principle of personal bar, because, under the Acts, persons dealing in good faith with the buyer or seller or mercantile agent are entitled to deal with him on the footing that his possession of the document of title implies that he has authority to dispose of it.

[4] *Mitchell* v. *Heys & Sons*, 1894, 21 R. 601, per Lord Kinnear at p. 610. This general rule, as is pointed out by Lord Kinnear, may be excluded by the operation of the doctrine of personal bar, where the person taking the document or the goods can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. Cp. per Lord Shaw in *Commonwealth Trust* v. *Akotey*, [1926] A.C. 72, at p. 76. Again, a person who is in possession of a bill of lading or of corporeal moveables under a contract which purports to pass the property, but which is liable to be set aside on the ground of fraud, may, though his title is defeasible, validly pass the property to a transferee who takes it in good faith and for value; for a contract induced by fraud is valid until it is rescinded—*Morrisson* v. *Robertson*, 1908 S.C. 332, per Lord Kinnear at p. 338; cf. *Pease* v. *Glouhec*, 1866, L.R. P.C. 219.

[5] *Vide, supra*, paras. 615, 616. In view of the existence of the rule—a rule, which, as regards bills of lading, had been established by decisions long before the date of the Factors Act—that the transferee of a bill of lading can defeat a previous vendor's right of stoppage *in transitu*, Willes J. in *Fuentes* v. *Montes*, 1868, L.R. 3 C.P. 269, at p. 276, observes that negotiable instruments "include" bills of lading "as against stoppage *in transitu* only."

SECTION 4.—FEATURES COMMON TO ALL FULLY NEGOTIABLE INSTRUMENTS.

618. An attribute common to every negotiable instrument is that the instrument is capable of being sued on by the holder of it in his own name. In England, historically, one of the most notable conveniences attending negotiable instruments was that they offered an easy and effectual expedient for eluding the stubborn rule of English common law that, generally speaking, a debt is not assignable. Before the year 1875—the year in which the Judicature Act of 1873 came into operation—a chose in action was not, as a rule, assignable at law otherwise than by giving the assignee a power of attorney enabling him to sue thereon in the assignor's name; and even now an assignment of a chose in action does not invest the assignee with a legal, as distinct from an equitable, right and entitle him to sue in his own name, unless the assignment is made in the manner and under the conditions specified in the Judicature Act of 1873.[2] Hence in England it may still be regarded as a distinguishing characteristic of a negotiable instrument that the holder of the instrument for the time being can sue on it in his own name or, in other words, has a right of action on the obligation contained in the document. In Scotland, the assignee of any right or document of debt can maintain an action in his own name; and accordingly the right of the transferee of an instrument to sue in his own name is not, in Scots law, a feature which distinguishes a negotiable instrument from an instrument which is merely assignable.[3]

619. All instruments which have been recognised in law as fully negotiable embody contracts for the payment of money, not contracts for the delivery of goods.[4] At the same time the right conveyed by a negotiable instrument is not necessarily a right to the payment of actual money; it may be a right to the delivery of another security representing money.[5] A document, however, which contains an obligation to pay money merely as part of a larger contract containing other stipulations is not properly negotiable.[1]

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[1] On the question whether, in certain circumstances, an indorsee of a bill of lading may get more favourable contractual rights than were possessed by an indorsee, see CARRIAGE BY SEA, Vol. III. p. 55, *ante*.

[2] See now Law of Property Act (15 Geo. V. c. 20), s. 136 (1), replacing the repealed Judicature Act, 1873, s. 25 (6).

[3] In *Crouch* v. *Crédit Foncier of England*, 1873, 8 Q.B. 374, Lord Blackburn, at p. 381, points out that the assignee of a Scottish bond, which is assignable by the law of Scotland, may sue in his own name in the Courts of England, but that he has not a better title than those from whom he took the bond unless, perhaps, if the contract is by the law of Scotland not merely assignable but also negotiable.

[4] *Dixon* v. *Bovill*, 1856, 3 Macq. 1; *Connal & Co.* v. *Loder*, 1868, 6 M. 1095. A document purporting to pass by delivery and to convey rights *in re* may possess the attribute of negotiability by estoppel, *i.e.* be *quasi*-negotiable through the operation of personal bar. See para. 656 *et seq.*, *infra*.

[5] *Goodwin* v. *Robarts*, 1876, 1 App. Cas. 476; *Rumbolt* v. *Metropolitan Bank*, 1877, 2 Q.B.D. 194.

620. Again, in a negotiable instrument the obligation to pay must be absolute; it must not depend on a condition or contingency.[2] "It would perplex commercial transactions if paper securities were issued into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty." [3] The mere fact, however, that an instrument has annexed to it certain limitations, which modify the nature of the obligation undertaken, does not necessarily deprive it of the character of a negotiable instrument.[4]

SECTION 5.—CONDITIONS ON WHICH PROTECTION IS GIVEN TO PERSONS TAKING NEGOTIABLE INSTRUMENTS.

SUBSECTION (1).—*Document must be* ex facie *Negotiable and in Deliverable State.*

621. The document must be in a deliverable state and be in terms compatible with its being negotiable. A document, though it is within the class of negotiable instruments, must, to be negotiated, be in a state in which the right can be transferred by mere delivery. Thus if the instrument requires indorsement for its transference, *e.g.* a bill of exchange or cheque payable to order, it is not negotiable until it is indorsed.[5] If the nature or tenor of the instrument is inconsistent with an intention that the right represented by the instrument should pass by mere delivery,[6] or indicates an intention that the right should only pass subject to any defect or want of title of the deliverer, a person taking the instrument cannot invoke the principles applicable to negotiable instruments.[7] An instrument which has been negotiable may cease to be so, *e.g.* by restrictive indorsement,[1] or by crossing with the words "not negotiable." [2] The condition of the document itself may be such as to excite suspicion and convey a warning, so that a transferee can acquire no better title than the person from whom he took it had. Thus, under the Bills of Exchange Act, 1882, a bill of exchange, when it is overdue, can be "negotiated" in the sense in which the Act uses that term, *i.e.* it remains transferable by delivery, but no person who takes it can acquire or give a better title than that which the person from whom he took it had.[3] The purpose of the law applicable to negotiable paper is to facilitate the circulation of paper, fair and regular upon its face, and to protect the *bona fide* purchasers of such paper.[4]

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[1] *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*, 1888, 21 Q.B.D. 352; *Thomson* v. *Bell*, 1894, 22 R. 16; *Cairney* v. *Macgregor's Trs.* 1916, 1 S.L.T. 357, at p. 360; *Kirkwood* v. *Smith*, [1896] 1 Q.B. 572.

[2] *Crouch* v. *Crédit Foncier of England*, 1873, 8 Q.B. 374.

[3] Per Kenyon C.J. in *Carlos* v. *Fancourt*, 1794, 5 T.R. 482.

[4] *Venables* v. *Baring Bros. & Co.*, [1892] 3 Ch. 527, per Kekewich J.

[5] The property in the indorsed instrument remains unchanged until the instrument is delivered—*Lord Advocate* v. *M'Neill*, 1866, 4 M. (H.L.) 20. An instrument in the form of a promissory note payable to maker's order is not a note within the meaning of the Bills of Exchange Act, 1882, unless and until it is indorsed by the maker; and a promissory note is inchoate and incomplete until delivery thereof to the payee or bearer—Bills of Exchange Act, 1882, ss. 83, 84.

[6] *E.g.* instruments which are on the face of them intended only to pass by transfer in the books of a company and not by delivery—*London and County Banking Co.* v. *River Plate Bank*, 1887, 20 Q.B.D. 234, per Manisty J.; reversed on other points, 1888, 21 Q.B.D. 535, but the opinion of Manisty J. on this point was assumed to be correct in *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 267.

[7] *E.g.* Post Office orders issued under Post Office Regulations—*Fine Art Society* v. *Union Bank*, 1886, 17 Q.B.D. 705; cp. *Orr and Barber* v. *Union Bank of Scotland*, 1854, 1 Macq. 513.

SUBSECTION (2).—*Good Faith.*

622. The instrument must have been acquired in good faith and for value. Every successive holder of the instrument is *prima facie* deemed to have taken it in good faith and for value. But if the course of dealing with the instrument is, at some stage, tainted with fraud, this presumption no longer holds, and the holder must prove affirmatively that, subsequent to the fraud, value has in good faith been given for the instrument, though not necessarily by himself. After the instrument has been acquired by anyone for value and in good faith, the owner cannot recover it.

623. A *bona fide* holder is one who takes the instrument honestly and without knowledge of any defect in the title of the transferor. The question of good or bad faith is a question of fact to be determined in each case on a consideration of the whole circumstances.[5] A negotiable instrument will be deemed to have been taken in good faith where it is in fact taken honestly, whether it is done negligently or not.[1] Negligence on the part of a person taking a negotiable instrument does not fix him with the defective title of the party passing it to him.[2] Negligence or foolishness in not suspecting that there is anything wrong when there are circumstances which might lead to that suspicion is not inconsistent with good faith; but if the party taking the instrument in fact suspects that there is something wrong, he is put on his inquiry, and if he takes the instrument without any inquiry, or if on inquiry the suspicion is not removed, he is not acting in good faith. "If he was honestly blundering and careless, and so took a bill of exchange or bank note when he ought not to have taken it, still he is entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer but because he thought in his own secret mind—I suspect there is something wrong, and, if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty." [3] The holder of a negotiable instrument is not affected by the doctrine of constructive notice. "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took it in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry." [4]

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[1] As to restrictive indorsement of bills of exchange, *vide* Bills of Exchange Act, 1882, ss. 32 (6) and 35.

[2] As to cheques crossed "not negotiable," *vide* Bills of Exchange Act, 1882, s. 80. Crossing a cheque "not negotiable" does not make it untransferable but merely exempts it from the operation of the rule whereby a valid title is acquired to negotiable instruments taken in good faith for value in the ordinary course of business—*National Bank* v. *Silke*, [1891] 1 Q.B. 435.

[3] Sec. 36 (2). As to the effect on a bill of exchange of marks of cancellation or erasure, or of an alteration which is "material" and "apparent," *vide* Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 63 and 64. An alteration is not "apparent" if careful scrutiny on the part of the holder would not have disclosed it—*Woolatt* v. *Stanley*, 1928, 138 L.T. 630. Alteration by pure accident does not effect negotiability—*Hong Kong and Shanghai Banking Corporation* v. *Lo Lee Shi*, [1928] A.C. 181. As to the effect of an alteration in an indorsement—*Bank of Montreal* v. *Exhibit and Trading Co.*, 1906, 22 T.L.R. 722. The drawer of a cheque has a duty, arising out of the contractual relations existing between banker and customer, to take reasonable care in the drawing of the cheque so as to prevent alteration in its amount—*London Joint Stock Bank* v. *Macmillan*, [1918] A.C. 777. There is no such duty on the part of the drawer or acceptor of a bill of exchange towards possible future indorsees—*Scholfield* v. *Londesborough*, [1896] A.C. 514, per Lord Watson at pp. 536, 537.

[4] Per Earl C. in *Colson* v. *Arnot*, 1874, 15 Am. Rep. 496, at p. 499.

[5] *Ferguson, Davidson & Co.* v. *Jolly's Tr.*, 1880, 7 R. 500. As to circumstances which may create a duty of inquiry, see *Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333, per Lord Macnaghten.

624. The mere fact that the transaction is out of the ordinary is not a reason for holding that it ought to have raised doubt or suspicion. "To treat that which is merely infrequent or unusual as irregular by the law merchant would be, I think, to make an inroad on the established rules of the law merchant without any sufficient ground." [5]

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[1] *Goodman* v. *Harvey*, 1836, 6 A. & E. 870, per Lord Denman; *Swan* v. *North British Australian* Co., 1863, 2 H. & C. 175, per Byles J. at p. 184. Cp. Bills of Exchange Act, 1884, s. 90; *Venables* v. *Baring Bros.*, [1892] 3 Ch. 527. In the case of cheques the relation of banker and customer gives rise to duties, and neglect of these duties may involve liability—Bills of Exchange Act, s. 82; *Ross* v. *London County and Westminster Bank*, [1919] 1 K.B. 678; *Commissioners of Taxation* v. *English, Scottish, and Australian Bank*, [1920] A.C. 683, at p. 688; *Underwood* v. *Bank of Liverpool and Martins*, [1924] 1 K.B. 775; *Lloyds Bank* v. *Chartered Bank of India, Australia, and China*, [1929] 1 K.B. 40.

[2] Thus, where negotiable securities had been stolen, the fact that the theft had been advertised and that the person into whose hands the instruments came would have known of the theft if he had not been negligent does not disentitle him from being a *bona fide* holder—*Raphael* v. *Bank of England*, 1855, 17 C.B. 161; *Venables* v. *Baring Bros.*, [1892] 3 Ch. 527; see also *Tatam* v. *Haslar*, 1889, 23 Q.B.D. 345.

[3] Per Lord Blackburn in *Jones* v. *Gordon*, 1877, 2 App. Cas. 616, at p. 629. Cp. *Ross* v. *London County, Westminster, and Parr's Bank*, [1919] 1 K.B. 678.

[4] Per Lord Herschell in *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, at p. 221.

[5] *Auchteroni & Co.* v. *Midland Bank*, [1928] 2 K.B. 294, at p. 304.

625. Knowledge that the person dealing with a negotiable instrument is only an agent does not compel the person taking it to inquire into the nature of his title or the extent of his authority.[1] "A third party, dealing in good faith with an agent acting within his ostensible authority, is not prejudiced by the fact that as between the principal and the agent the agent is using his authority in such a way that the principal can rightly complain that the agent is using his authority for his own benefit and not for that of his principal. But it is otherwise where the third party has notice of irregularity, putting him on inquiry whether the ostensible authority is being exceeded." [2]

SUBSECTION (3).—*Value.*

626. The rule that any person in possession of a negotiable instrument can convey a good title to it, even when he is acting in fraud of the true owner, applies only where the transferee has taken the instrument for value as well as in good faith.[3] Where a person takes a negotiable instrument without consideration, or for an illegal consideration, from a holder who had no title, he, even if he had no notice of any defect in the title of the person from whom he took it, cannot set up a title against the true owner.[4] The rule that a negotiable instrument, if transferred by a holder who had no title, cannot be retained against the true owner unless the transferee has in one form or another given valuable consideration for it appears, both in Scotland and in England, to rest—like the other general rules as to negotiability [5]—on the law merchant.

627. In determining whether a person who is in possession of a negotiable instrument is, or is not, a holder for value, questions of difficulty sometimes arise. In *London and County Banking Co.* v. *London*

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[1] *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; *Reckitt* v. *Barnett*, [1929] A.C. 176; *Lloyds Bank* v. *Chalmers*, [1929] 1 K.B. 40, at p. 56; *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740, at pp. 747, 754; *Thomson* v. *Clydesdale Bank*, 1893, 20 R. (H.L.) 59, per Lord Watson at p. 61.

[2] Per Scrutton L.J. in *Lloyds Bank* v. *Chartered Bank of India, Australia, and China*, [1929] 1 K.B. 40, at p. 56.

[3] A negotiable instrument may, of course, be the subject of donation if the donor has a good title. The holder of a bill of exchange (whether for value or not) who derives his title to the bill through a holder in due course and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (Bills of Exchange Act, s. 29 (3)).

[4] *Banque Belge pour L'Étranger* v. *Hambrouck*, [1921], 1 K.B. 321, per Scrutton L.J. at pp. 329, 330; cp. *Sinclair* v. *Brougham*, [1914] A.C. 398, per Lord Parker at p. 447. Money itself, stolen or obtained by fraud, can, if it can be traced into the hands of a person who gave no valuable consideration for it, be recovered from that person by the true owner; and a negotiable instrument stands on the same footing as money, and is much more easily identified—Smith's Leading Cases, Notes on *Miller* v. *Race*, 13th ed., i. 540.

[5] *M'Lean* v. *Clydesdale Bank*, 1883, 11 R. (H.L.) 1, per Lord Blackburn at p. 3. The ordinary rule of Scots law is that consideration is not essential to contractual obligation; and the English doctrine of consideration does not apply to negotiable instruments in the same way as to ordinary contracts—Anson, Law of Contract, 17th ed., p. 301.

and River Plate Bank [1] certain negotiable instruments were stolen from the defendants by their manager and were acquired by the plaintiffs in good faith and for value. The defendants' manager subsequently obtained the instruments by fraud from the plaintiffs and restored them to the defendants, who did not know that the instruments had been stolen or had ever been out of their possession. It was held that, it being the duty of a thief to restore stolen property, the defendants were entitled to keep the bonds as *bona fide* holders for value. In a Scots case,[2] however, Lord Kincairney held that the mere fact that the person from whom a negotiable bond has been stolen has accidentally reobtained possession of it does not entitle him to keep it in a question with a person who had taken it in good faith and for value from the thief. In *Lloyds Bank* v. *Swiss Bankverein* [3] H. received from the defendants certain bearer bonds for a specific purpose. H. used them for his own purposes. On the defendants demanding repossession of the bonds, H. gave them other negotiable securities, of equivalent amount and of equivalent class, which belonged to the plaintiffs. It was held that the defendants, being unaware that H. had no authority to deal with the plaintiffs' securities, were entitled, as holders for value, to keep the bonds received by them from H.

628. The adequacy or inadequacy of the consideration given for the instrument may be an element of great weight in coming to a decision on the question whether the instrument was taken in good faith. It is a recognised principle in the ordinary law of contract that gross inadequacy of consideration may go far to prove that the transaction is tainted with fraud. "Gross inadequacy of consideration is a circumstance not to be lost sight of in judging of the transaction when challenged on other grounds. It is an element of importance to be weighed with all the other circumstances, and if, in the relations or the conduct of the parties, there are any suspicious circumstances, then gross inadequacy of consideration may reasonably furnish what the English lawyers call 'a vehement presumption of fraud.'" [4] The fact that a person has obtained a negotiable instrument for a consideration entirely incommensurate with the value of the instrument—while it is not, in itself, sufficient to affect the title of the holder—may, in the light of other circumstances, afford ground for drawing the inference that he, when he took the instrument, knew that there was something wrong about it, and was assisting in committing a fraud.[5] On the other hand, the fact that the transferee of an instrument has given full value, or a reasonably adequate value, for it will go far in itself to shew that he, on his part, acted in good faith in taking the instrument.[1]

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[1] 1888, 21 Q.B.D. 535. The grounds on which this judgment proceeded were regarded by Lord Kincairney as "far-fetched and strained"—*Walker & Watson* v. *Sturrock*, 1897, 35 S.L.R. 26.

[2] *Walker & Watson* v. *Sturrock*, *supra*.

[3] 1912, 28 T.L.R. 501; 17 Com. Cas. 280. In this case other negotiable securities belonging to the plaintiff were handed by H. to the defendants in place of a cheque which the defendants had returned to H. It was held that the defendants did not hold these securities for value and were not entitled to keep them, in respect that they knew that the cheque which they had returned to H. was worthless.

[4] *Tennent* v. *Tennent's Trs.*, 1868, 6 M. 840, per Lord Ardmillan at p. 865.

[5] *Jones* v. *Gordon*, 1877, 2 App. Cas. 616.

SECTION 6.—WHENCE QUALITY OF NEGOTIABILITY IS DERIVED.

629. The quality of negotiability can be conferred on an instrument only (1) by statute or (2) by the law merchant—the recognised custom of merchants.[2] "I have no hesitation in saying that, independently of the law merchant and of positive statute, the law does not, either in Scotland or England, enable any man by a written engagement to give a floating right of action at the suit of anyone into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title."[3] It is not within the competency of private persons by stipulation in their contract to attach to any document the incidents of negotiability. Such a stipulation in a contractual document may be effectual as between the immediate parties, but it cannot deprive persons who may become holders of the instrument of the right to recover it, and the property represented by it, from anyone to whom a thief or finder may have transferred the instrument, even though that transferee took it in good faith and for value.[4]

SECTION 7.—NEGOTIABILITY BY STATUTE.

SUBSECTION (1).—*Bills of Exchange and Promissory Notes.*

630. The negotiability of bills of exchange, long recognised by the law merchant, is now regulated by the Bills of Exchange Act, 1882.[5] This statute also codifies the law as to promissory notes, whose negotiability had previously received statutory recognition.[6]

SUBSECTION (2).—*Cheques.*

631. The negotiability of cheques is also recognised and governed by the Bills of Exchange Act, 1882, which defines a cheque as a bill of exchange drawn on a banker, payable on demand.[7] A cheque, however, possesses certain features of its own which are not common to all bills of exchange. The Act, in defining a cheque as a bill of exchange, is declaratory of the common law.[1]

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[1] *Raphael* v. *Bank of England*, 1855, 17 C.B. 161, per Jervis L.C.J.

[2] Cp. per Bowen L.J. in *Pickles* v. *London and County Banking Co.*, 1887, 18 Q.B.D. 515, at p. 519.

[3] Per Lord Chancellor Cranworth in *Dixon* v. *Bovill*, 1856, 3 Macq. 1, at p. 16.

[4] *Crouch* v. *Crédit Foncier of England*, 1873, L.R. 8 Q.B. 373, per Blackburn J. at p. 387. A representation on the face of an instrument that it is transferable by delivery, or transferable without the risk of being met by defences which the issuer might have against the original creditor or his assignees, may be effectual in virtue of the principle of personal bar; *vide infra*, para. 656 *et seq.*

[5] 45 & 46 Vict. c. 61.

[6] In Scotland by 12 Geo. III. c. 72; in England by the Promisory Notes Act, 1704 (3 & 4 Anne, c. 9). As to Bills of Exchange and Promissory Notes see BILLS OF EXCHANGE, Vol. II., *ante*.

[7] Bills of Exchange Act, 1802, s. 73.

SUBSECTION (3).—*Bank Notes.*

632. It has been settled law in Scotland since 1749 [2] and in England since 1758 [3] that bank notes are fully negotiable. Bank notes, being promissory notes issued by a banker payable to bearer on demand, may be regarded as coming within the provisions of the Bills of Exchange Act, and as being now negotiable by statute.[4] Under the Currency and Bank Notes Act, 1928,[5] bank notes for £1 and for 10s. may be issued by the Bank of England, and these notes are current and are legal tender in Scotland and Northern Ireland as well as in England.

SUBSECTION (4).—*Dividend Warrants.*

633. Dividend warrants, drawn, in the ordinary form, payable to order are on the same footing as cheques; and under s. 95 of the Bills of Exchange Act, 1882, the provisions of that Act as to crossed cheques apply to a warrant for payment of dividend. The Act, further, in s. 97 (3) (*d*), expressly provides that nothing in the Act shall affect the validity of any usage relating to dividend warrants or the indorsement thereof. It would therefore appear that dividend warrants, apart from some peculiarity in the form of the particular instrument, are within the Act, and that, like other instruments within the Act, they are recognised by the Act as negotiable instruments unless they contain words prohibiting transfer or indicating an intention that they should not be transferable.[6] A statement on a dividend warrant, that the warrant will not be honoured after three months from the date of issue unless specially indorsed by the secretary of the company, does not render the warrant conditional and put it outwith the category of cheques.[7] The National Debt (Conversion) Act, 1888,[8] provides that any dividend warrant issued under that Act is to be deemed to be a cheque within the meaning of the Bills of Exchange Act, 1882.

SUBSECTION (5).—*Currency Notes.*

634. Currency notes issued by the Treasury under the Currency and Bank Notes Act, 1914,[9] *i.e.* bearer notes for £1 and 10s., are made by the Act part of the currency of the United Kingdom and legal tender in the United Kingdom for the payment of any amount.[1]

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[1] *M'Lean* v. *Clydesdale Bank*, 1887, 11 R. (H.L.) 1, per Lord Blackburn at p. 3. As to cheques see BILLS OF EXCHANGE, Vol. II. pp. 256 *et seq.*, *ante.*

[2] *Crawfurd* v. *Royal Bank*, 1749, Mor. 875.

[3] *Miller* v. *Race*, 1758, 1 Burr. 452.

[4] As to statutory regulations governing the issue of bank notes see BANK, Vol. II. p. 77, *ante.*

[5] 18 & 19 Geo. V. c. 13, s. 1 (1) (*a*).

[6] Bills of Exchange Act, 1882, s. 8 (4).

[7] *Thairlwall* v. *Great Northern Rly. Co.*, [1910] 2 K.B. 509 at p. 520.

[8] 51 Vict. c. 2, s. 30 (5).

[9] 4 & 5 Geo. V. c. 14, s. 1 (1).

SUBSECTION (6).—*East India Company's Bonds.*

635. By statute,[2] as interpreted by the Courts, the quality of negotiability was annexed to East India Company's bonds.

SECTION 8.—NEGOTIABILITY BY USAGE.

636. Instruments of contract may have the quality of negotiability annexed to them by the custom of merchants, recognised by the Courts. The tests applied by the Courts in determining whether an instrument is negotiable under this head are: (1) the terms of the document, and (2) the usage of merchants in this country in dealing with it.

637. The instrument must be of such a nature, and in such a state, as to be compatible with the property in it, and all rights under it, passing by delivery of the instrument.[3] Though an instrument be by the custom of merchants transferable, like cash, by delivery, "yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument." [4] If it appears upon the face of an instrument that the right to recover thereon is limited to one particular individual [5] or that it is not transferable by mere delivery,[6] or that it is only transferable subject to defences pleadable against the transferor, custom or usage cannot make it negotiable. An instrument payable to the signed receipt of a named payee does not become of the nature of a document payable to bearer by reason of it being issued under regulations which provide that it may be paid by a banker without the receipt contained in the instrument being signed by the payee.[1] So a document, which upon the face of it was a receipt, and which did not contain a promise to pay the amount stated in it to the holder of the document, was held not to be negotiable, though it bore a footnote setting forth that it was payable on being presented for payment by a London banker.[2]

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[1] These notes are no longer issued by the Treasury, but the Bank of England, under the Currency and Bank Notes Act, 1928, now issues bank notes of the same denominations. By that Act outstanding currency notes issued under the Currency and Bank Notes Act, 1914, are deemed bank notes for which the Bank of England is liable.

[2] 51 Geo. III. c. 64, s. 4.

[3] See para. 621, *supra*.

[4] Per Lord Blackburn in *Crouch* v. *Crédit Foncier of England*, 1873, L.R. 8 Q.B. 373, at p. 381. The fact that foreign Government bonds to bearer may be negotiable although the holder cannot sue the foreign Government upon them in this country is not inconsistent with this test of negotiability, for, as is pointed out in Chalmers on Bills of Exchange, 19th ed., at p. 372, the exemption of a foreign Government from suit in this country is a personal exemption and does not arise out of any defect of title on the part of the holder.

[5] *Partridge* v. *Bank of England*, 1866, 9 Q.B. 396. The document in question in that case was a dividend warrant payable to a particular person and not to order or to bearer. It would appear that now under the provisions of the Bills of Exchange Act, 1882, s. 8 (4), such a dividend warrant is a negotiable instrument. See para. 633, *supra*. Cf. *Goodwin* v. *Robarts*, 1875, L.R. 10 Ex. 337, at p. 354. It is to be noted that in England prior to the Act of 1882 a bill or note drawn payable to a specified person without the addition of the words "or order" or other words authorising transfer was not negotiable. In Scotland such a bill or note was negotiable at common law. By s. 8 (4) of the Act the law of England on this matter has been assimilated to the law of Scotland.

[6] *London and County Banking Co.* v. *London and River Plate Bank*, 1887, 20 Q.B.D. 232, per Manisty J.; *Colonial Bank* v. *Cady and Williams*, 1890, 14 App. Cas. 267.

638. The instrument must be, by the custom of trade, transferable, like cash, by delivery. The usage of trade regarding the instrument is a question of fact.[3] The evidence as to usage must be that of an actual practice to treat as negotiable instruments of the particular class to which the instrument in question belongs.[4] The question whether the negotiability of a foreign document is established by usage depends, not on the usage with regard to it abroad, but on the usage with regard to it among merchants in this country.[5] To make a foreign instrument negotiable in this country, it is not sufficient to shew that it is negotiable in the foreign country; it must be shewn that it is, by the usage of merchants, negotiable here.[6] "If all that can be proved," observed Lord Esher, where the question was as to the negotiability of a bond issued by the Prussian Government, "is that by the law or custom in Prussia the instrument is negotiable, then the answer is that an English Court and English merchants are not bound by a law or custom of trade in Prussia. To prove that an instrument is negotiable in the sense required, there must be something to make it so by English law."[7] The custom, in order to be established as a custom in this country, must be general and not local or prevalent only in a particular market or particular section of the commercial world.[8] It is unnecessary, however, to shew a custom in relation to the securities of a particular company—it being sufficient to shew that instruments of a like character issued by other companies are treated as negotiable.[9] Hence when an English custom to treat a particular class of documents as negotiable has been judicially recognised, it becomes unnecessary to lead proof to establish the negotiability of documents belonging to that class.[10] *Crouch* v. *Crédit Foncier of England*[11] has been cited as authority for the proposition that, so far as documents issued in England are concerned, the list of negotiable instruments is closed, and that no evidence of usage will avail to annex the incidents of negotiability to documents whose negotiability has not been previously recognised by the Courts. The principle, however, is now established that the law merchant is not to be regarded as stereotyped and immutable, but is capable of being extended and adapted to meet the changing needs and methods of commerce; and that, at the present day, negotiability by usage—though the usage is of recent origin—may be proved in the case of instruments issued in this country no less than in the case of instruments issued in a foreign country.[1] Accordingly, it may now be taken that the Courts both in Scotland and in England will follow and give effect to mercantile usage, and will recognise the negotiability of an instrument, whether issued in this country or abroad, provided that the nature and tenor of the instrument itself is consistent with a complete title to it passing by delivery, and that it is proved that, by the general usage of merchants in this country, it is transferred by delivery.

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[1] *Fine Art Society* v. *Union Bank of London*, 1886, 17 Q.B.D. 705.

[2] *Jones & Co.* v. *Coventry*, [1909] 2 K.B. 1029, at p. 1040.

[3] See *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, per Lord Herschell.

[4] *Venables* v. *Baring Bros.*, [1892] 3 Ch. 527.

[5] *Gorgier* v. *Mieville*, 1824, 3 B. & C. 45.

[6] *Picker* v. *London and County Banking Co.*, 1887, 18 Q.B.D. 515. Cp. *Williams* v. *Colonial Bank*, 1888, 38 Ch. D. 388.

[7] *Picker* v. *London and County Banking Co.*, *supra*, at p. 518.

[8] *Vide* per Lord Bowen in *Taylor* v. *London Joint Stock Bank*, 1886, 34 Ch. D. 95, at p. 113.

[9] *Venables* v. *Baring Bros.*, *supra*.

[10] Cp. *Edelstein* v. *Schuler*, [1902] 2 K.B. 144.

[11] 1873, L.R. 8 Q.B. 374.

SECTION 9.—PARTICULAR CLASSES OF INSTRUMENTS HELD NEGOTIABLE BY USAGE.

SUBSECTION (1).—*Bearer Bonds—British and Foreign.*

639. Various classes of foreign instruments payable to bearer, *e.g.* the bonds of foreign and colonial Governments, and bonds issued by foreign corporations and companies, have been recognised by the Courts as negotiable by the usage of merchants in this country. The following are examples: Neapolitan obligations to bearer;[2] bonds of the King of Prussia;[3] Unified Egyptian bonds and New South Wales bonds;[4] Cedula bonds payable to bearer;[5] bearer bonds of American railways;[6] bearer bonds of various foreign companies;[7] bonds for French Rentes payable to bearer.[8] Further, in recent cases the principle has been accepted that the negotiability of bonds issued in Great Britain, payable to bearer, may be established by usage equally with bearer bonds issued abroad.[9] In determining whether the form and tenor of an instrument are compatible with its being negotiable in this country, the tests applied in the case of a foreign instrument are, generally speaking, those applicable in the case of a British instrument. Thus the following foreign instruments have been held not to be negotiable in this country:—Certificates of shares in American railways with transfer forms on the back signed in blank;[10] certificates of shares in an American railway with a power of transfer signed in blank;[1] bonds issued by the Prussian Government and negotiable according to the law of Prussia, but not proved to be negotiable by the usage of merchants in England.[2]

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[1] *Goodwin* v. *Robarts*, 1876, 1 App. Cas. 476; *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658; *Edelstein* v. *Schuler*, [1902] 2 K.B. 144. In the case last-cited, it is explained that, as regards usage, more depends on the number of transactions creating the usage than on the period of time over which these transactions are spread—that is to say, the period of time during which the usage has existed.

[2] *Levy* v. *Smith*, 1831, 7 Bing. 284.

[3] *Gorgier* v. *Mieville*, 1824, 3 B. & C. 45.

[4] *London and County Banking Co.* v. *London and River Plate Bank*, 1889, 21 Q.B.D. 535.

[5] *Simmons* v. *London Joint Stock Bank*, [1892], A.C. 201.

[6] *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740; *Venables* v. *Baring Bros. & Co.*, [1892] 3 Ch. 529; *Easton* v. *London Joint Stock Bank*, 1887, 34 Ch. D. 95; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.

[7] *Edelstein* v. *Schuler & Co.*, [1902] 2 K.B. 144.

[8] *Symons* v. *Mulhorn*, 1882, 30 W.R. 875.

[9] See *supra*, para. 638, and *infra*, para. 645.

[10] *London and County Banking Co.* v. *London and River Plate Bank*, 1887, 20 Q.B.D. 232.

640. Bonds issued by a foreign Government afford no enforceable ground of action in the Courts of this country against the foreign Government.[3] "The municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign Governments as such. . . . These so-called bonds amount to nothing more than engagements of honour binding, so far as engagements of honour can bind, the Government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign Government or even by the ordinary tribunals of the country which issued them, without the consent of the Government of that country."[4] Nor is there liability on the part of an agent in this country issuing such bonds.[5]

SUBSECTION (2).—*Bearer Scrip.*

641. Scrip to bearer issued in this country for the bonds of a foreign Government was recognised as negotiable in *Goodwin* v. *Robarts.*[6] Following this decision, scrip certificates of an English company—*i.e.* documents giving the bearer or holder for the time being a right to shares, after the instalments upon such shares are duly paid—were, on proof that such scrip certificates were in use to be transferred by mere delivery, held to be negotiable.[7]

SUBSECTION (3).—*Share Warrants to Bearer.*

642. Share warrants to bearer—*i.e.* warrants issued by a company, with respect to fully-paid shares or stock, stating that the bearer of the warrant is entitled to the shares therein specified, and, it may be, providing, by coupons or otherwise, for the payment of the future dividends on the shares [8]—are negotiable instruments.[9]

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[1] *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 269, per Lord Selborne at p. 285. See *infra*, para. 648 as to *quasi*-negotiability by personal bar.

[2] *Picker* v. *London and County Banking Co.*, 1887, 18 Q.B.D. 515.

[3] *Goodwin* v. *Robarts*, 1875, L.R. 10 Ex. 337.

[4] Per Jessel M.R. in *Twycross* v. *Dreyfus*, 1877, 5 Ch. D. 605; cp. *National Bolivian Navigation Co.* v. *Wilson*, 1880, 5 App. Cas. 176.

[5] *Goodwin* v. *Robarts*, *supra*, at p. 344.

[6] 1876, 1 App. Cas. 476. It was pointed out by Lord Chancellor Cairns, at p. 490, that there is no real distinction between bonds for the payment of money and scrip promising to give such bonds.

[7] *Rumball* v. *Metropolitan Bank*, 1877, 2 Q.B.D. 194. This decision is notable as being an early recognition that negotiability by usage may be established in the case of documents issued by an English joint stock company no less than in the case of documents issued by foreign corporations or companies.

[8] Companies Act, 1929 (19 & 20 Geo. V. c. 23), s. 70.

[9] *Webb, Hale & Co.* v. *Alexandrina Water Co.*, 1905, 93 L.T. 339. Cp. *Stern* v. *Regina*, [1896, 1 Q.B. 211.

SUBSECTION (4).—*Exchequer Bills.*

643. Exchequer bills—*i.e.* securities issued by the Treasury, bearing interest at a rate notified from time to time by the Treasury in the London *Gazette* and entitling the holder to be paid at the Bank of England, out of the Consolidated Fund, the sum stated in the bill, at the expiration of any period of twelve months, not later than five years from the date thereof—are negotiable instruments.[1] An Exchequer bill is payable to bearer only so long as the payee's name is not filled in.

SUBSECTION (5).—*Exchequer Bonds.*

644. Exchequer bonds, unless registered, are negotiable instruments. These bonds are payable to bearer with bearer coupons attached.[2]

SUBSECTION (6).—*Debentures to Bearer.*

645. The term "debenture" is employed to denote different forms of obligation. "You may have mortgage debentures; you may have debentures which are bonds; you may have a debenture which is nothing more than an acknowledgment of indebtedness." [3] The question of the negotiability of a debenture depends on the form of the instrument. It is now settled by statute that debentures to bearer, issued by a company in Scotland, are, equally with bonds issued by a company in England, valid and binding according to their terms.[4] While a debenture may be only a certificate of indebtedness, it generally contains or imports a contract to pay, which is usually at the present day accompanied by some charge or security on the property of the company. Where an instrument issued as a debenture is a promissory note, within the definition of that term in the Bills of Exchange Act, 1882, s. 8, the doubt, which formerly existed,[5] whether a bill or note issued under the seal of a corporation or company was a negotiable instrument has been removed by s. 91 (2) of that Act. In *Bechuanaland Co.* v. *London Trading Bank* [6] debentures payable to bearer which were not promissory notes were held to be negotiable instruments passing by delivery; and at the present day the Courts will, without evidence, take judicial notice of the usage that debentures of this kind are negotiable instruments.[1] "In my opinion," observed Bigham J. in *Edelstein* v. *Schuler*,[1] "the time has passed when the negotiability of bearer bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been proved so often and its convenience is so obvious that it must be taken now to be part of the law." [1]

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[1] *Wookey* v. *Pole*, 1820, 4 B. & Ald. 1; *Brandao* v. *Barnett*, 1846, 12 Cl. & F. 787. The issue of Exchequer bills is now regulated by 29 & 30 Vict. c. 25; 40 & 41 Vict. c. 2; and 52 & 53 Vict. c. 6. Interest coupons payable to bearer are annexed to the bills.

[2] These bonds are regulated by 29 & 30 Vict. c. 25; 52 & 53 Vict. c. 6; and 5 & 6 Geo. V. c. 55.

[3] Per Lindley L.J. in *British India Steam Navigation Co.* v. *Inland Revenue*, 1881, 7 Q.B.D. 165, at p. 172. Cp. *Levy* v. *Abercorris Co.*, 1887, 37 Ch. D. 260.

[4] Companies Act, 1929 (19 & 20 Geo V. c. 23), s. 77.

[5] *Crouch* v. *Crédit Foncier of England*, 1873, L.R. 8 Q.B. 374, at pp. 382, 393. Cp. *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 267; *France* v. *Clark*, 1884, 26 Ch. D. 257.

[6] [1898] 2 Q.B. 658.

646. A debenture not to bearer, *e.g.* to a named person or his assignees, is not a negotiable instrument, and *prima facie* the transferee of such a debenture takes subject to equities. But the nature or terms of the instrument may be such as to infer a representation that the contract is assignable free from exceptions pleadable by the issuer against the creditor or any assignee of his.[2] Thus it is a frequent practice to insert in a debenture, issued in a form rendering it transferable, a condition that the money secured by the debenture will be paid without regard to any equities or set off between the company and the original or any intermediate holder. Such a condition is effectual and bars the company issuing the debenture from asserting any equities of their own affecting a previous holder, as against a person who has taken the debenture in good faith and for value.[3] It has been held in England that the principle of estoppel may also operate to preclude a corporation or company issuing debentures from alleging against an innocent transferee for value that the debentures have been issued illegally.[4]

SUBSECTION (7).—*Coupons.*

647. Coupons, attached to debentures to bearer or other bearer securities, for interest or dividends due on particular dates are, like cheques or dividend warrants, negotiable instruments. Now that the negotiability of debentures to bearer has been established, the negotiability of coupons attached thereto is clear. By s. 7 of the Colonial Stock Act, 1870,[5] coupons attached to stock certificates to bearer under that Act are to be deemed to be cheques on a banker for the purpose of any enactment relating to cheques, other than a stamp Act.[6]

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[1] *Edelstein* v. *Schuler*, [1902] 2 K.B. 144. Frequently debentures are issued payable to bearer, but capable of being registered, *e.g.* to the bearer or, when registered, to the registered holder. In such a case the instruments are transferable by delivery so long as they are unregistered; but any holder can at any time, by registration, put a stop to the negotiability of the instrument.

[2] *In re Goy & Co.*, [1900] 2 Ch. 149. See *infra*, para. 656.

[3] *In re General Estates Co.*, 1868, L.R. 3 App. Cas. 758; *In re Imperial Land Co. of Marseilles*, 1870, L.R. 11 Eq. 478; *In re Goy & Co.*, *supra*. A debenture containing an undertaking to pay the money to any holder who becomes registered is effectual to bar the company from asserting equities against an intermediate holder only where it is so framed as to confer an unconditional right to be registered on presentation of the debenture to the company—*In re Palmer's Decorative and Furnishing Co.*, [1904] 2 Ch. 743.

[4] *Webb* v. *Herne Bay Commissioners*, 1870, L.R. 5 Q.B. 642; *In re Romford Canal Co.*, 1883, 24 Ch. D. 85. It is doubtful whether, in Scotland, the principle of personal bar would operate to this effect if the instrument issued was null *ab initio* –*General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282, at pp. 291 and 294.

[5] 40 & 41 Vict. c. 59.

[6] Cp. Finance Act, 1921 (11 & 12 Geo. V. c. 32), Rule 5 of Sched. III.

SECTION 10.—PARTICULAR INSTRUMENTS HELD NOT NEGOTIABLE.

SUBSECTION (1).—*Share Certificates with Blank Transfers.*

648. The term blank transfer is used to denote a transfer signed by the transferor but with a blank for the name of the transferee. The legal title in shares can be completely transferred only by the registration of the transferee in the books of the company. Consequently, since mere delivery of a share certificate with a blank transfer does not confer a title to the shares, blank transfers, with certificates, are not negotiable instruments.[1] Evidence of a usage to treat such documents as negotiable,[2] or an admission that they are negotiable abroad,[3] does not bring them within the category of instruments recognised as negotiable by the Courts of England and Scotland. Share certificates with blank transfers are, however, currently marketable in this country, and to them the principle is applicable that where the holder of a contractual instrument clothes a third party with the apparent ownership and right of disposition of it, he is barred from asserting his title as against a person to whom such person has disposed of it and who took it in good faith and for value.[4]

649. In *Colonial Bank* v. *Cady and Williams* [5] Lord Herschell points out that, where a registered owner of shares executes a blank transfer and entrusts it in that condition to a third party, persons dealing with that third party have a right to assume that he has authority to complete a transfer; and in the same case Lord Watson states the effect of the delivery of share certificates with a blank transfer, signed by the registered owner, thus:—"Delivery passes, not the property in the shares, but a title legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." [5] Hence a registered holder of shares who hands the share certificates with a blank transfer to an agent with authority to pledge them for not less than a specified sum may, where the agent pledges them for a smaller sum and misappropriates the money, be bound by the pledge.[6] So if the owner of shares leaves the certificate, with a signed blank transfer endorsed thereon, with his stockbroker, who wrongfully pledges it with a banker who has no notice of the fraud, the owner is barred from disputing the right of the banker.[7] In the case of foreign and colonial companies the form of transfer is often printed on the back of the certificate, and, this being executed in blank, the document is, in ordinary usage, treated as the insignia of possession and of apparent title to the shares, and is dealt with, by way of sale or pledge, on that footing. In short, share certificates with blank transfers issued in a state in which they would in ordinary course be accepted as " in order," belong to the class of documents which convey a representation to anyone taking the documents in good faith and for value that he will stand to all intents and purposes in the place of the previous holder; and the effect given in law to the delivery of such instruments is based on the principle of personal bar and not on the rules applicable to negotiable instruments.[1]

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[1] *London and County Banking Co.* v. *London and River Plate Bank*, 1887, 20 Q.B.D. 232; *France* v. *Clark*, 1881, 26 Ch. D. 257; Cp. *Swan* v. *North British Australasian Co.*, 1863, 32 L.J. Ex. 273, per Byles J.

[2] *Colonial Bank* v. *Hepworth*, 1887, 3 Ch. D. 36.

[3] *Williams* v. *Colonial Bank*, 1888, 38 Ch. D. 388; 1890, 15 App. Cas. 267.

[4] *Stern* v. *Regina*, [1896] 1 Q.B. 211. See para. 656, *infra*.

[5] 1890, 15 App. Cas. 267, per Lord Herschell at p. 286, and per Lord Watson at pp. 277, 278.

[6] *Fry* v. *Smellie*, [1912] 3 K.B. 282. See AGENCY, Vol. I. p. 212, *ante*.

[7] *Fuller* v. *Glyn, Mills, Currie & Co.*, [1914], 2 K.B. 168.

SUBSECTION (2).—*Letters of Credit.*

650. These are either "special," *i.e.* addressed to particular persons by name, or "general," *i.e.* addressed to all persons in general, or, in other words, to anyone to whom they may be shewn.[2] They are generally operated on by bills of exchange, but may be operated on by cheque, or by mere request for payment.[3] A letter of credit is not a negotiable instrument.[4] But the person presenting the letter is not necessarily the person entitled to make the draft, and, accordingly, bankers to whom the letter is presented have a duty to see that the signature to the draft is genuine—payment of a forged draft being no payment as between the person paying and the person whose name is forged.[5] Where a letter of credit in favour of A. was stolen, and the thief, having indorsed A.'s name on it, presented it to a bank, and received the money on the representation that he was authorised by A. to receive the money, it was held that payment upon the forgery did not discharge the bank.[6] When a letter of credit is addressed to persons in general, a person who acts on it has an actual legal contract with the granter of the letter.[7] Further, the granter of a letter of credit is bound by the representation on the face of it to perform his obligation to persons who have paid money or discounted bills on the faith of it.[8] Hence any person paying money or discounting bills upon the faith of a general letter of credit, in conformity with its terms and requirements, is not affected by equities which might be pleaded by the granter of the letter against the person in whose favour it was granted.[1]

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[1] See para. 658, *infra*. The cases illustrating the application of the doctrine of personal bar to share certificates with blank transfers, and the limits of its application to these documents, are numerous. Recent cases, in addition to those cited *supra*, are *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Robinson* v. *Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841; *Ireland* v. *Hart*, [1902] 1 Ch. 522; *France* v. *Clark*, 1881, 26 Ch. D. 257.

[2] Cp. *Union Bank of Canada* v. *Cole*, 1877, 47 L.J. C.P. 100, at p. 109. See note to *British Linen Co.* v. *Caledonian Insurance Co.*, 1861, 4 Macq. (H.L.) at pp. 112, 113.

[3] *Morgan* v. *Lariviere*, 1875, 1 R. (H.L.) 423, at p. 432.

[4] *Orr* v. *Union Bank*, 1854, 1 Macq. 413, per Lord Cranworth at p. 523; *British Linen Co.* v. *Caledonian Insurance Co.*, 1861, 4 Macq. 107; *Struthers* v. *Commercial Bank of Scotland*, 1842, 4 D. 460.

[5] *Orr* v. *Union Bank*, *supra*.

[6] *British Linen Co.* v. *Caledonian Insurance Co.*, *supra*.

[7] Per Brett L.J. in *Union Bank of Canada* v. *Cole*, 1877, 47 L.J. C.P. 100, at p. 109, where it is pointed out that, even where the letter is not addressed to persons in general, it does not follow that there may not arise a contract between a person who acts on the letter and the person who signs the letter.

[8] See para. 656 *et seq.*, *infra*.

SUBSECTION (3).—*Circular Notes.*

651. Circular notes, mainly used by travellers and generally issued for definite sums, are cashed directly, without the intervention of drafts, on presentation to bankers or correspondents of the granter, whose names are usually set out in an accompanying "letter of indication," to which the holder of the circular note appends his signature to guard against forgery. A circular note may be in such a form that, when filled up and signed, it is equivalent to a bill of exchange or cheque, and therefore negotiable. Where certain circular notes which, along with a letter of indication, had been forwarded to A. by his agent, were lost in course of transmission, A. claimed repayment from the issuing bank of the sum paid by him for the notes, and tendered the letter of indication, which had arrived safely. It was held that there was no obligation on the bank to refund *simpliciter*, but that they were entitled to debit his account with the amount of the notes, unless they were offered proper indemnity. The judgment proceeded on the ground that there was a possibility that the bank might be called upon to pay the notes, for they might get into the hands of a dishonest person who might get them cashed by some of the correspondents of the bank named in the letter of indication, who, in that event, would have recourse against the bank.[2] "Possession of the letter of indication does not preclude this. The correspondent who cashes a circular note ought to and commonly does, for his own protection, look at the letter of indication for the purpose of identifying the holder of the circular note; but his doing so is not made a condition precedent. If he cashes the circular note for the person mentioned in the letter of indication, he has recourse against the banker, although, from civility, over-confidence, or mere omission, he may not have asked for the letter of indication. And, on the other hand, if, after the letter of indication has been properly filled in by the rightful owner with his signature, a foreign correspondent cashes a circular note for a thief, who has succeeded in stealing the letter of indication and circular note, and in forging the name of the holder, no care in looking at the letter of indication can eke out a right to recover against the banker, as upon a payment to the right person."[3]

SUBSECTION (4).—*I.O.U.'s.*

652. I.O.U.'s and similar acknowledgments of indebtedness are not negotiable. The delivery of the document does not transfer the title to the debt. The debt can only be transferred by intimated assignation, the assignee taking subject to any defects in the transferor's title.[1]

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[1] *In re Agra and Masterman's Bank*, 1867 L.R. 2 Ch. 391.

[2] *Conflans Quarry Co.* v. *Parker*, 1867, L.R. 3 C.P. 1.

[3] *Per curiam* in *Conflans Quarry Co.* v. *Parker*, *supra*.

SUBSECTION (5).—*Deposit Receipts.*

653. The acknowledgments granted by bankers for sums of money received by them on deposit are not, in their ordinary form, negotiable. The person entitled to uplift a deposit receipt is not necessarily the beneficial owner of the contents of the receipt;[2] and, even if he be the beneficial owner, the property in the money deposited is not transferred by merely passing the document from hand to hand.[3] Although the delivery of the document be accompanied by indorsation the property in the money which the bank has contracted to pay does not pass to the indorsee, unless it is shewn that such was the intention of the parties.[4]

SUBSECTION (6).—*Pay and Pension Warrants.*

654. Pay and pension warrants issued by the Paymaster-General, though bearing a footnote setting forth that the warrants are to be presented for payment by a London banker, are not negotiable instruments.[5]

SUBSECTION (7).—*Postal and Post Office Orders.*

655. Postal orders for sums of small amount, not exceeding 21s., are issued payable on demand at any post office at any time within three months of the last day of issue. Under the regulations of the Post Office, postal orders are not negotiable.[6] Under the Post Office Act, 1908,[7] s. 25, any banker receiving payment for a principal in respect of any postal order, or of any document purporting to be a postal order, is not thereby rendered liable to anyone except his principal; but it is provided that this section does not relieve the principal for whom the order has been presented of any liability in respect of his possession of the order or of the proceeds thereof. Post Office orders or money orders, as they are now generally called, are orders for sums not exceeding £40. In *Fine Art Society* v. *Union Bank*[8] it was held that a banker placing Post Office orders to the credit of one customer instead of to the credit of another, who was in fact the true owner, was liable to the latter for the amount of the orders, in respect that they were not negotiable instruments.

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[1] See I.O.U., Vol. VIII. p. 416, *ante*.

[2] See per Lord Shaw in *Dickson* v. *National Bank of Scotland*, 1917 S.C. (H.L.) 50, at p. 59.

[3] *M'Nicol* v. *M'Dougall*, 1889, 17 R. 25.

[4] *Barstow* v. *Inglis*, 1857, 20 D. 230; *Sharp* v. *Paton*, 1883, 10 R. 1000; *Allan's Exr.* v. *Union Bank of Scotland, Ltd.*, 1909 S.C. 206.

[5] *Jones & Co.* v. *Coventry*, [1909] 2 K.B. 1029. The ground of judgment was that the warrant was in the form of a receipt and contained no direct contract to pay.

[6] Under the Currency Act, 1914 (4 & 5 Geo. V. c. 14), s. 1 (6), postal orders were temporarily made legal tender to the United Kingdom; but this emergency enactment was repealed by Proclamation as from 23rd February 1915.

[7] 8 Edw. VII. c. 48.

[8] 1886, 17 Q.B.D. 705.

It was contended that, by virtue of a Post Office regulation providing that Post Office orders, when presented for payment by a banker, shall be payable without the signature by the payee of the receipt contained in the order, an order, when the name of the banker presenting the order is written or stamped upon it, is in the nature of an instrument payable to bearer in the hands of a banker. But the Court were of opinion that that was not the true effect of the regulation, and that it operated "only to make the signature of the banker a substitute for the signature to the receipt of the original payee." [1]

SECTION 11.—QUASI-NEGOTIABILITY BY THE OPERATION OF PERSONAL BAR.

656. Although an instrument be not negotiable in the proper sense of the term, it may become *quasi*-negotiable by the operation of the principle of personal bar; that is to say, particular parties in particular circumstances may be barred from denying it the quality of negotiability. The fact that a document, though not a negotiable instrument, may to certain effects have attached to it the quality of negotiability, is an application of the principle that a party may by his acts or representations bar himself from setting up a defence which would otherwise be available.[2] On this principle, if an instrument, though not, properly speaking, negotiable, professes on the face of it to confer a good title on the transferee by delivery, and is, in fact, passed from hand to hand by the usage of merchants, both the issuer of the instrument and each holder of it may, by their conduct and having regard to the nature of the instrument, be barred from disputing the title of; or setting up a claim as against, a person who has taken the instrument in good faith and for value.[3] "There is nothing to prevent a debtor from contracting with his creditor that he will not avail himself against a transferee of any rights which he may possess against the creditor or any assignee of his." [4] "If you give a person a document, knowing he can use it in a particular way, and intending he shall use it in that particular way, by obtaining money upon it, you cannot afterwards be allowed to say, as against persons from whom he has obtained money, that the person is not to have the benefit of it." [5]

657. It is not only the issuer of such an instrument who may be barred by the representation on the instrument from impeaching the title of a person who has acted thereon, but holders for the time being of the instrument may also be treated as adopting the representation and so be barred from denying the negotiable quality of the instrument.[1] The principle is stated in *Goodwin* v. *Robarts* [2] by Lord Cairns thus: "The plaintiff bought in the market scrip which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that anyone who became *bona fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign Government. . . . The scrip itself would be a representation to anyone taking it—a representation which the appellant must be taken to have made or to have been a party to—that, if this scrip were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed for the moment that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign Government; still the appellant is in the position of a person who has made a representation on the face of his scrip that it would pass with a good title to anyone taking it in good faith and for value, and who had put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representations so made." The doctrine that certain incidents of negotiability may be annexed to a document by its form, or by its containing special stipulations, has been applied to documents varying greatly in their nature and terms.[3]

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[1] *Fine Art Society* v. *Union Bank of London*, 1886, 17 Q.B.D. 705, per Fry L.J. at p. 713.

[2] As to the identity in this respect of the Scots doctrine of personal bar with the English doctrine of estoppel, see *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, per Lord Kinnear at p. 610. See also per Lord Birkenhead in *Gatty* v. *Maclaine*, 1921 S.C. (H.L.) 1, at p. 7.

[3] As to the grounds upon which the personal bar is based, see *Fry* v. *Smellie*, [1912] 3 K.B. 282, per Vaughan Williams L.J. at p. 292.

[4] *In re Goy & Co.*, [1900] 2 Ch. 149, per Stirling L.J.; *In re Agra and Masterman's Bank*, 1867, L.R. 2 Ch. 391.

[5] Per Jessel M.R. in *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205, at p. 219; cp. per Lord Kyllachy in *Clavering, Son & Co.* v. *Goodwins, Jardine & Co.*, 1891, 18 R. 652, at p. 657.

658. The principle that the terms, express or implied, of a contractual instrument may be such as to bar the debtor in the instrument, or persons transferring the instrument, from asserting a title or setting up equities against a transferee who has taken the instrument for value and in good faith is frequently termed "negotiability by estoppel," and the instrument is commonly said to be "negotiable by estoppel." But these expressions are somewhat misleading.[1] It is indeed only where the instrument is not a negotiable instrument that the doctrine of negotiability by personal bar or estoppel can come into operation.[2] The doctrine has no application at all to documents which are in the proper sense negotiable instruments. It depends on an estoppel or bar raised against the true owner or the issuer or a holder of the instrument for the time being, by his own conduct, and its effect is to make the instrument *quasi*-negotiable as against him, but not to make it negotiable in the proper sense of the term. Thus if such an instrument be stolen from the owner, it would appear that no title can be acquired by anyone through the thief.[3]

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[1] *Vide* per Bowen L.J. in *Easton* v. *London Joint Stock Bank*, 1886, 34 Ch. D. 95, at p. 113. The decision of the Court of Appeal in this case was overturned in the House of Lords, *sub nom Earl of Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333; but the judgment of the House of Lords turned on their view that the bank did not take the bonds in good faith without notice of defects in title. The principles laid down in the Court of Appeal were adopted in the House of Lords in *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; *Société Générale* v. *Walker*, 1886, 11 App. Cas. 20; *Fry* v. *Smellie*, [1912] 3 K.B. 282.

[2] 1876, L.R. 1 App. Cas. 476. More recent statements of the principle, and the circumstances in which it applies, are to be found in *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794; *Smith* v. *Prosser*, [1907] 2 K.B. 735; *London Joint Stock Bank* v. *Macmillan*, [1918] A.C. 777.

[3] *E.g. Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205 (warrants for steel rails); *In re Agra and Masterman's Bank*, 1867, L.R. 2 Ch. 391 (letter of credit); *In re Blakely Ordnance Co.*, 1867, L.R. 3 Ch. 154 (debentures payable to bearer. At the date of this decision the negotiability of debentures to bearer had not been established, *vide* Buckley on Companies, 11th ed., at p. 525); *In re General Estates Co.*, 1868, L.R. 3 Ch. 758 (debenture bonds payable to A. or order and indorsed by A. for value); *Higgs* v. *Northern Assam Tea Co.*, 1869, L.R. 4 Ex. 387 (debentures payable to "A., his executors, administrators, or assigns"); *In re Goy & Co.*, [1900] 2 Ch. 149 (debentures issued under a condition that the moneys secured by them would be paid without regard to equities between the company and the original or any intermediate holder); *Fry* v. *Smellie*, [1912] 3 K.B. 282 (share certificate and a transfer executed in blank); *Stern* v. *Regina*, [1896] 1 Q.B. 211 (transfer, printed on the back of share certificate, executed in blank).

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[1] See observations of Bowen L.J. in *Easton* v. *London Joint Stock Bank*, 1886, 34 Ch. D. 95, at pp. 113, 114.

[2] The instruments to which the doctrine has been applied were in every case either plainly not negotiable instruments (*e.g.* in *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205, they were warrants for steel rails and not obligations for the payment of money. See para. 619, *supra*), or were regarded by the Courts as outwith the category of negotiable instruments, or at least as documents whose negotiability had not been established—*In re General Estates Co.*, 1868, L.R. 3 Ch. 758 ; *In re Agra and Masterman's Bank*, 1867, L.R. 2 Ch. 391.

[3] *Colonial Bank* v. *Cady and Williams*, 1890, 15 App. Cas. 267 ; *Colonial Bank* v. *Hepworth*, 1887, 36 Ch. D. 36 ; *Schofield* v. *Earl of Londesborough*, [1896] A.C. 514.

NEGOTIORUM GESTIO.

See AGENCY.

NEWSPAPERS.

See DEFAMATION; MEETINGS; PRINTERS AND PRESS.

NEW TRIAL.

See JURY TRIAL.

NEXT OF KIN.

See EXECUTOR; HEIR; KINSHIP; SUCCESSION.

NIGHT POACHING.

See CRIME.

NOBILE OFFICIUM.

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SECTION 1.—EXTENT OF ITS PRESENT EXERCISE.

659. The origin and history of the *nobile officium* as a branch of the equity jurisdiction of the Court of Session has been treated under EQUITY.[1] This article is confined to the extent of its exercise in recent times and according to present practice. No claim is now made by the Court of Session to the jurisdiction of the Privy Council, as was at least once made;[2] or to have power to make Acts of Sederunt of an administrative character, as it at one time did;[3] or to impose penalties for contravention of statutes when the statute is silent, as in *Gordon* v. *Grant*.[4]

660. The *nobile officium* is now deemed an extraordinary equitable jurisdiction of the Court of Session inherent in it as a Supreme Court.[5] Much also that was formerly considered the exercise of the *nobile officium* as an extraordinary branch of equity competent only to the Court of Session, and in the Court of Session competent only to the Inner House, is now deemed ordinary equity common to all Courts, or is regulated by statute giving the jurisdiction in the first instance to one of the judges of the Court of Session, or to the Sheriff, or to either.

661. Although anomalous or exceptional cases occur, the chief categories of the *nobile officium*, considered as extraordinary equity, now are—

1. To supply omissions or defects in statutes or statutory procedure, of which the chief head is in bankruptcy.

2. To supply omissions or defects in deeds or writings in order to carry out their true purpose, of which the chief head is in the law of trusts.

GENERAL AUTHORITIES.—Stair, iv. 3, 1; More's Notes, ccclxxiv; Ersk. i. 3, 32; Mackay, Practice, 1209; Mackay, Manual, 82, 530; Maclaren, Court of Session Practice, 100, 828.

[1] See Vol. VI. p. 258, *ante*.

[2] *Hamilton* v. *Boyd*, 1741, Mor. 7335; see Ersk. i. 3, 23.

[3] Acts of Sederunt, 1553–1790—*e.g.* A.S., 29th January 1687, 31st July 1691, 4th August 1692 (stents); 8th July 1725, 26th July 1748 (price of ale); 2nd November 1725 (brewers of Edinburgh); 6th July 1692 (beggars); 23rd February 1740 (poorhouses).

[4] 1765, Mor. 7356.

[5] Ersk. i. 3, 22.

3. To afford remedies by petition to the Inner House of the Court of Session in cases competent neither to the Outer House of that Court nor to the Sheriff.

662. With regard to the first two categories, it is not of course in every case that the Court will supply omissions in statutes or in deeds. The rule is the other way.[1] The Court will now seldom do so unless there is a precedent or analogous case, and the omissions so supplied are only, speaking generally, those in administrative or executive details.[2] But if we regard Courts as business bodies, and judges as men of business, it is convenient that such powers should be sometimes exercised, provided there is no risk of injustice to unrepresented interests. Perhaps the *nobile officium* might be exercised to a greater extent than is now common. The safe course, however, for the practitioner, in advising, is to assume that it is doubtful whether it will be exercised unless it has been exercised before. The Court, in modern practice, leans on statutes and decisions more than upon its inherent equitable power to deal with circumstances which the Legislature or the parties have not provided for. The *nobile officium* in the civil law, in finding remedies, might formerly have been, but can scarcely now be, compared to what has been called the native vigour of the criminal law with regard to punishing new offences, with this difference, that remedies are more favourably considered than punishment or penalties. It need hardly be said that the Court will only exercise its *nobile officium* where there is no other remedy.[3]

663. It deserves to be kept in view that the English Supreme Courts of Equity have often exercised a beneficial jurisdiction without waiting for a legislative solution. Of this the "Equity to a settlement" of a married woman, and the doctrine of "Cy-près" in charitable trusts, are examples. The latter has been applied to some extent in Scotland, but the former required a statute. This is one of the points which shew there may be advantage in separating Equity from Common Law Courts, although it does not outweigh the graver disadvantages of a conflict of jurisdiction in the same country.

SECTION 2.—NOBILE OFFICIUM AS TO STATUTES.

664. The *nobile officium* has been applied in bankruptcy in cases where there has been an omission in following out the statutory provisions: For example, authority has been granted to record the abbreviate when omitted to be done in proper time,[4] and to insert *Gazette* notices where so omitted,[1] but not at the instance of the bankrupt alone, in order to supersede subsequent proceedings; [2] to record the abbreviate of new where it had been presented to the Keeper of the Register of Inhibition after the statutory period had expired; or to correct an error [3] in the form of notice.[4] The Court has also authorised the necessary steps for the appointment of a new trustee when property falling under the bankruptcy was discovered after discharge of the original trustee,[5] where the notices of the award of sequestration and of the meeting of creditors to elect a trustee were not timeously inserted [6] and where on the appointed day no creditors had attended,[7] or the creditors failed to elect a trustee; [8] for the continuance of a sequestration although the sederunt book had been lost; [9] but this was refused in a case where the original petition and warrants had been lost.[10] It has also accepted the report of the accountant of Court as to a bankrupt's right to discharge where the trustee who ought to have reported had disappeared,[11] or had never been confirmed; [12] declared a bankruptcy at an end on petition by bankrupt's testamentary trustees and the representative of the only creditor; [13] discharged the representative of a bankrupt after his death.[14] In such cases the procedure is by petition to the Inner House, though it may remit to the Lord Ordinary or Sheriff, with powers. In one case where the election of a trustee was set aside, the Sheriff of his own authority ordered a meeting for a new election.[15] But even where the sequestration is in the Sheriff Court a petition to the Inner House is the only safe course.[16]

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[1] See *West Highland Rly. Co.* v. *Inverness County Council*, 1904, 6 F. 1052; *Parochial Board of Borthwick* v. *Parochial Board of Temple*, 1891, 18 R. 1190.

[2] See *Perth Quarter Sessions*, 1861, 24 D. 221.

[3] *Lord Macdonald's Curator*, 1924 S.C. 163; *Forth Shipbreaking Co.*, 1924 S.C. 489; *Campbell*, 1890, 18 R. 149; *Lord Glentanar* v. *Scottish Industrial Musical Association*, 1925 S.C. 226.

[4] *Allan*, 1861, 23 D. 972; *Stark*, 1886, 23 S.L.R. 507; *Train & M'Intyre*, 1923 S.C. 291.

665. The following are examples of the rarer exercise of a similar jurisdiction in cases other than bankruptcy. Where the heritors declined to execute the Act 1696 and settle a school, the Court did so; [17] but it may be doubted whether this course would now be taken. When road trustees had by inadvertence failed to make up a statutory list of bridges, the Court authorised it, after the lapse of the statutory time.[18] The trustees of an Episcopal Church were authorised to remove gravestones from part of the churchyard which was being encroached upon for the extension of the Church and to re-erect them upon or near the fabric of the new building.[19] A remit was made to the Sheriff to take the necessary steps to reconstitute a Salmon Fishery Board which had lapsed.[1] The Court, however, refused to appoint a meeting for electing Police Commissioners when the prior proceedings were set aside as irregular;[2] and a statutory remedy had to be found.[3] Where a father as tutor and administrator in law for his pupil daughter presented a petition for authority to sell her heritage, the Court held that he was not a trustee in the sense of the Trusts (Scotland) Act, 1921, and accordingly had not the powers of sale conferred by that Act, but that the petition could be entertained by the Court in the exercise of the *nobile officium.*[4]

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[1] *Garden*, 1848, 10 D. 1509; *Ross*, 1852, 14 D. 546; *Foubister*, 1869, 8 M. 31.

[2] *Robertson* v. *Wilson*, 1885, 12 R. 1361.

[3] *White Cross Insurance Association*, 1924 S.C. 372.

[4] *Fife*, 1844, 6 D. 686; *Von Rotberg*, 1876, 4 R. 263; *Lipman & Co.'s Tr.*, 1893, 20 R. 818.

[5] *Young*, 1888, 16 R. 92; *Drybrough & Co.* v. *MacDonald*, 1893, 20 R. 396; *MacDuff* v. *Baird*, 1892, 20 R. 101.

[6] *Car Mart, Ltd.*, 1924 S.C. 269.

[7] *Robb & Co.*, 1925 S.N. 31.

[8] *Struthers*, 1861, 23 D. 702; *Steuart* v. *Chalmers*, 1864, 2 M. 1216.

[9] *Skirving's Tr.*, 1883, 11 R. 17.

[10] *Anderson*, 1884, 11 R. 405; Goudy, Bankruptcy, 4th ed., p. 428.

[11] *White*, 1893, 20 R. 600; *Mackay*, 1896, 24 R. 210.

[12] *Aitken* v. *Robson*, 1914 S.C. 224.

[13] *Macleish's Trs.*, 1896, 24 R. 51.

[14] *Gray's Exrcs.*, 1928, S.L.T. 558.

[15] *Mann* v. *Dickson*, 1857, 19 D. 942.

[16] See Goudy, Bankruptcy, 4th ed., p. 429; *Hutton*, 1872, 10 M. 620.

[17] *Caithness Presbytery* v. *Heritors of Reay*, 1773, Mor. 7449.

[18] *Banff County Road Trs.*, 1881, 9 R. 20.

[19] *Christie*, 1926 S.C. 750.

SECTION 3.—WITH REGARD TO TRUSTS.

666. The *nobile officium* has been exercised with reference to trusts: (1) with regard to construction of deeds, and (2) with regard to the grant or withdrawal of powers; for though the two may run into each other, it is well to distinguish them.

SUBSECTION (1).—*Construction of Deeds.*

667. Questions of construction are as a rule competent to all Courts, and every judge must construe any writing which comes before him fairly and according to its true meaning. Construction cannot in general be deemed a branch of equity or limited to the Supreme Court.[5] But there is a class of cases, chiefly in charitable trusts, in which what may be called an extensive construction has been applied, and this can only be done by the Court of Session, though in that Court it is not limited to the Inner House. The leading case on this subject is *Magistrates of Dundee* v. *Morris*,[6] where the House of Lords reversed the decision of the Court of Session, and held that the construction of charitable bequests should be benignant, and that where the charitable fund, objects, place, and general mode of application were stated by the truster, the Court would supply the necessary details of administration, and sustain the trust although the trust deed was in other respects vague and in part erased.[7]

668. But while the Court has interposed to supply omissions in the provisions for the creation of trusts, there are other cases in which it will not interfere, holding such interference to be beyond the power even of a Supreme Court of Equity. Thus where the objects of a trust which is not purely charitable have failed, the Court will not distribute the funds or make a new scheme for their application.[8] Nor will it sanction payment to English parents of infant beneficiaries who are not entitled by the law of England to grant a discharge.[1] The Court has a special power, derived from its *nobile officium* and now recognised by statute, to settle schemes for charitable trusts.[2] It also has jurisdiction to correct abuses, to declare the right of election or set aside improper admissions;[3] but the latter cases are now treated as a branch of ordinary jurisdiction, and most frequently dealt with in an ordinary action.

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[1] *Campbells*, 1883, 10 R. 819; see *Duke of Argyll*, 1896, 23 R. 991.

[2] *Tod* v. *Anderson*, 1869, 7 M. 412.

[3] 40 & 41 Vict. c. 21, s. 14.

[4] *Shearer's Tutor*, 1924 S.C. 445; cf. *Ferrier's Tutrix*, 1925 S.C. 571.

[5] Lord Moncreiff in *Synod of Aberdeen* v. *Milne's Trs.*, 1847, 9 D. 745.

[6] 1857, 9 D. 918; 1858, 3 Macq. 134.

[7] Cf. *Royal Infirmary*, 1861, 23 D. 1213; CHARITABLE TRUSTS, Vol. III. p. 213, *ante*.

[8] *Mitchell* (*Seamen's Society of Montrose* v. *Burness*), 1878, 5 R. 954; and Lord Cottenham in *Bain* v. *Black*, 1849, 6 Bell's App. 329.

SUBSECTION (2).—*Powers of Trustees.*

669. With regard to the powers of trustees, the Trusts Acts, consolidated in the Trusts (Scotland) Act, 1921,[4] are now generally resorted to. These Acts have given the jurisdiction, in the first instance, to one of the Lords Ordinary; but the equitable jurisdiction of the Inner House has not been taken away, and may occasionally require to be appealed to.[5] Power of sale of heritage (including feuing and excambing) is not granted except in cases of absolute necessity,[6] but under the statute may be granted when expedient and even where at variance with the purpose of the trust.[7] Power to borrow on security of the trust estate may be deduced by necessary implication from the trust deed, but was not in use to be conferred by the Court under the *nobile officium*.[8] It is now conferred upon trustees by the statute where not at variance with the terms or purposes of the trust,[9] and where it is so at variance it may be granted by the Court.[10] Power to make advances to beneficiaries with vested interests has often been granted by the Court,[11] and under the Statute of 1921 may now be granted in favour of minor descendants of the truster though the interest is only contingent.[12]

SUBSECTION (3).—*Removing of Trustees.*

670. The power of removing trustees is still treated as very exceptional, and only exercised by the Court in cases of grave misconduct.[13] No provision has been made for it under the Trusts Acts except in cases of insanity, incapacity from physical or mental disability, or absence from the United Kingdom.[14] In such cases the *nobile officium* of the

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[1] *Atherstone's Trs.*, 1896, 24 R. 39.

[2] *Presbytery of Deer* v. *Bruce*, 1868, 6 M. 940; *University of Aberdeen* v. *Irvine*, 1869, 7 M. 1087.

[3] *Ross* v. *Governors of Heriot's Hospital*, 1843, 5 D. 609; Mackay, Manual, p. 85.

[4] 11 & 12 Geo. V. c. 58.

[5] *Prime Gilt Box Society*, 1920 S.C. 534; *Carmont* (*Comrades of the Great War*), 1922 S.C. 686; *Anderson's Trs.*, 1921, 1 S.L.T. 186.

[6] *Hay's Trs.* v. *Hay Miln*, 1873, 11 M. 694; *Stranraer Original Secession Congregation*, 1923 S.C. 722.

[7] *Chalmers Hospital* (*Banff*) *Trs.*, 1923 S.C. 220.

[8] *Kinloch*, 1859, 22 D. 174.

[9] 11 & 12 Edw. V. c. 58, s. 4.

[10] *Ibid.*, s. 5.

[11] See *Baird* v. *Baird's Trs.*, 1872, 10 M. 482.

[12] *Pattison*, 1870, 8 M. 575; *Thomson* v. *Miller's Trs.*, 1883, 11 R. 401; 11 & 12 Geo. V. c. 58 s. 16.

[13] *Gilchrist's Trs.* v. *Dick*, 1883, 11 R. 22; *Harris* v. *Howie's Tr.*, 1893, 21 R. 16; *Bowman* v. *Russell's Trs.*, 1891, 19 R. 205; *Whittle* v. *Carruthers*, 1896, 23 R. 775; *MacGilchrist's Trs.* v. *MacGilchrist*, 1930, S.L.T. 374.

[14] 54 & 55 Vict. c. 44, s. 8; 11 & 12 Geo. V. c. 58, s. 23.

Court cannot now be appealed to. They must be dealt with under the statute.[1] The necessity for removal in other cases may be frequently obviated by resignation or by the concurrence of all parties in the appointment of a factor.[2]

SECTION 4.—NOBILE OFFICIUM PETITIONS TO INNER HOUSE.

671. The petitions which may be held to belong to the *nobile officium* are those which are not statutory, and must still be presented to the Inner House. Some classes of such petitions have become so much matter of course that, in a Court combining equity with common-law jurisdiction, it is not surprising they should be considered rather a branch of the *praxis curiæ* than an exercise of extraordinary equitable jurisdiction, which is their real character. Before the Inner House was divided they would have gone before the whole Court, and they were originally granted in exercise of the supereminent power of the Court as a whole and now of its Divisions.

672. Such petitions are, to name a few examples of each—[3]

1. Petitions for the custody of children;[4] but many cases in which this was formerly necessary are now superseded by the statutory remedies provided by the Conjugal Rights Act, 1861,[5] and the Guardianship of Infants Acts, 1888,[6] and 1925.[7]

2. Petitions for the appointment of factors, curators, and trustees in cases not provided for by the Distribution of Business Act, 1857.[8] An example of this will be found in *Campbell* v. *Campbell*[9] (sequestration of an estate pending litigation); but the Lord Ordinary may appoint a factor to an executry estate.[10] On petitions as to trusts which do not come under the Trusts Act, see *Websters* v. *Miller's Trs.*[11] A singular case of a petition to change *ex-officio* trustees may be noted.[12]

3. Petitions for the recal of appointment of officers where appointed by the Inner House, but not where appointed by the Lord Ordinary.[13]

4. Petitions to authorise a change of name;[14] but the Court refused to entertain this petition where the petitioner did not hold a public office, such as notary,[15] or clergyman.[16]

5. Petitions to dispense with citation of next-of-kin;[17] or to modify the mode of citation, or service, or execution of diligence;[18] or *induciæ*.[19]

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[1] *Tod* v. *Marshall*, 1895, 23 R. 36.

[2] M'Laren on Wills, ii. 1278.

[3] See Maclaren, Court of Session Practice, p. 828, for a full list.

[4] *Nicolson* v. *Nicolson*, 1869, 7 M. 1118; *M'Callum* v. *M'Callum*, 1893, 20 R. 293.

[5] 24 & 25 Vict. c. 86, s. 9.

[6] 49 & 50 Vict. c. 27.

[7] 15 & 16 Geo. V. c. 45.

[8] 20 & 21 Vict. c. 56.

[9] 1863, 1 M. 991.

[10] *Rhind* v. *Sheach*, 1875, 2 R. 1002.

[11] 1887, 14 R. 501.

[12] *Harrison*, 1893, 20 R. 57.

[13] *Kyle*, 1862, 24 D. 1083.

[14] *Dunlop*, 20th May 1879; Mackay, Manual, p. 82.

[15] *Forlong*, 1880, 7 R. 910; *Robertson*, 1899, 2 F. 127.

[16] *Johnston*, 1899, 2 F. 75.

[17] *Kyle*, 1861, 23 D. 1104; *Buchan*, 1873, 11 M. 1216.

[18] *North of Scotland Bank*, 1891, 18 R. 460; *Robertson*, 1893, 20 R. 712.

[19] *M'Kidd*, 1890, 17 R. 547

In older cases the Court has suspended diligence on the ground of necessity, but it is doubtful whether it would now do so.[1]

6. Petitions to appoint public officers *ad interim* in case of the death or incapacity of the holder of the office. A list of the officers in whose cases this has been done is given in the books on Practice.[2] It was doubted, in the case of *Glassford Bell*, Sheriff of Lanarkshire, whether this could be done in the case of a Sheriff without leave of the Crown,[3] although it was in earlier practice by Act of Sederunt;[4] and now that matter has been regulated by statute[5] in case of the principal Sheriff. The case of a Sheriff-Substitute is regulated by arrangement between him, the Sheriff Principal, and the Crown. Petitions to appoint notaries are also presented to the Inner House.

7. Petitions to sequestrate estate and appoint a factor pending litigation;[6] or to appoint a factor to wind up a partnership.[7]

8. Petitions for admission to the Poor's Roll.[8]

9. Various applications have been granted with reference to the public records, which are in a special manner under the protection of the Court, of which the following are instances: To collate and sign a burgh register, which the predecessor of the town clerk had omitted;[9] to produce a recorded deed in an English Court upon caution.[10] In the case of parochial registers authority was refused, and the Lord President said nothing would induce the Court to order a public register to be sent out of the country. Extracts or excerpts from such registers, properly authenticated, can always be got.[11] A later case, in which a volume of marriage certificates in the custody of the Registrar-General was sent to London, is doubtful.[12] An application to send a deed, recorded in the Sheriff Court Books, for exhibition in the Court of New York was refused;[13] but authority was granted to send such a deed to the clerk of the Court of Session for stamping;[14] to give access to a deed after registration to enable a witness to complete his signature;[15] to restore public records which had been destroyed.[16]

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[1] *Hope-Brown*, 11th December 1816, F.C.; *Moodie*, 18th May 1819, F.C.

[2] See Mackay, Manual, p. 83; Maclaren, Practice, p. 102.

[3] Mackay, *loc. cit.*

[4] *Earl of Dumfries*, A.S., 23rd January 1745, Mor. 7434, and various Acts of Sederunt between 23rd January 1745 and 28th May 1790.

[5] 39 & 40 Vict. c. 70, s. 51.

[6] *Rintoul*, 1862, 1 M. 214; *Campbell* v. *Campbell*, 1883, 1 M. 991; *Speirs* v. *Speirs*, 1877, 5 R. 75; *Orr-Ewing* v. *Orr-Ewing's Trs.*, 1884, 11 R. 600 and 682; 13 R. (H.L.) 1.

[7] *Dickie* v. *Mitchell*, 1874, 1 R. 1030.

[8] A. of S., 21st December 1842; C.A.S., A, x.

[9] *Mags. of Elgin*, 1885, 12 R. 1036; cf. *Cowper*, 1883, 12 R. 415; *Hepburn*, 1905, 7 F. 484.

[10] *Macdonald*, 1877, 5 R. 44; *Inglis*, 1882, 9 R. 761; *Leigh Bennett*, 1893, 20 R. 787; *Mackenzie*, 1902, 4 F. 559.

[11] *Kennedy*, 1880, 7 R. 1129.

[12] *Earl of Euston*, 1883, 11 R. 235, see note by Rettie, 235.

[13] *Western Bank Liquidators*, 1868, 6 M. 656.

[14] *Gordon*, 1871, 2 S.L.R. 445.

[15] *Murray*, 1904, 6 F. 840.

[16] *Jeffreys*, 1827, 5 S. 334 (N.E. 310); *Dundas*, 1875 3 R. 273; *Stair Agnew*, 1890, 28 S.L.R. 164.

10. Petitions and complaints which conclude for punishment and penalties.[1] In a recent case the Inner House deprived a notary public.[2]

673. In vacation the Lord Ordinary on the Bills disposes of all petitions for appointment of factors whether presented to the Inner House or the Outer House. He may also dispose of cases involving the exercise of the *nobile officium*,[3] but only where there is urgency.[4]

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[1] See A.S., 11th July 1828, ss. 83 to 90; *M'Pherson* v. *Thorne*, 1844, 6 D. 422.

[2] *Incorporated Society of Law Agents* v. *Laing*, 1893, 21 R. 267.

[3] *Viscountess Hawarden* v. *Dunlop*, 1861, 23 D. 923; *Naismith*, 1910, 47 S.L.R. 625; *Buchanan*, 1910 S.C. 685.

[4] *Steuart* v. *Chalmers*, 1864, 2 M. 1216; *Greigs*, 1866, 4 M. 1103; *Aberdeen University Court*, 1901, 4 F. 122.

NOBILITY.

See PEERAGE AND OTHER DIGNITIES.

NOISE.

See NUISANCE.

NOMINATIM.

See HEIR; VESTING IN SUCCESSION.

NOMINATION.

See FRANCHISE AND ELECTION LAW.

NON ENTRY.

See CHARTER (FEUDAL); SUPERIOR AND VASSAL.

NON MEMINI.

See OATH ON REFERENCE.

NON VALENS AGERE.

See PRESCRIPTION.

NOTARIAL EXECUTION.

See DEEDS, EXECUTION OF.

NOTARIAL INSTRUMENT.

See COMPLETION OF TITLE.

NOTARY PUBLIC.

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SECTION 1.—GENERAL SCOPE OF OFFICE.

674. Notwithstanding much adverse legislation in recent years affecting the notary as such, he has in legal practice still some important functions. These include: noting and protesting bills, executing maritime protests, certifying the genuineness of documents for foreign and colonial use, and the taking of affidavits.

SECTION 2.—ORIGIN AND HISTORY.

675. The office of notary is traceable to the Tabellions of the Roman law, who had the preparation and authentication of legal documents. The evidence of the tabellion was equal to that of two unskilled witnesses. In England notaries are found co-operating in law investitures in the reign of Edward the Confessor (*circa* 1066), and in early days they were nominated by the Pope and Roman Emperor. In 1469, however, it was declared that "they should be henceforth made by the King," [1] and in 1563 [2] (when Mary was sovereign) that no one should be allowed to act as notary save with Royal authority and after being examined and admitted by the Lords of Session. In James VI.'s time [3] the clergy who had been officiating as notaries were forbidden to act except in the making of testaments; and in 1587 [4] it was enacted that the admission of notaries should absolutely cease for five years, and that none were to be admitted thereafter except such as had reasonable understanding in Latin and were otherwise competent, seven years' service being prescribed with some skilled legal practitioner whose testimony to their qualifications was required by the Lords of Session. The appointment of notaries was so regulated down to 1873. By the Act

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GENERAL AUTHORITIES.—The Office of a Notary Public as the same is practised in Scotland, 6th ed., 1831. The Law of Scotland relative to Notaries Public, by J. C. Murray, 1890. Reference may also be made to 1923, S.L.T. 103, for a recent article on the Notary Public, and to 1926, S.L.T. 54, for a list of the mottoes used by Notaries between 1872 and 1924.

[1] 1 James III. c. 30.

[2] 1563, c. 79.

[3] 1584, c. 133.

[4] 1587, c. 45.

of that year[1] any enrolled law agent became entitled to admission as a notary on paying the appropriate stamp duty, and caution was dispensed with. A later Act of 1896[2] provided that, "except during the first twelve months after the passing of this Act, no person shall be admitted as a notary public in Scotland until he shall have been admitted and enrolled as a law agent." No notaries *per se* could thus be created after 14th August 1897. The Act, however, gave facilities for persons then acting as notaries being admitted as law agents.

SECTION 3.—MANNER OF ADMISSION.

676. The proceedings for the admission of enrolled law agents as notaries are conducted by the clerk and agent to the admission of Notaries (whose office is in Edinburgh). A petition is presented to the First Division of the Court of Session, and the prayer thereof is granted *de plano*. The clerk then inserts in the register kept by him the entrant's name, designation, and place of business, together with the date of his admission, and the entrant adhibits his subscription, and the motto which he is thereafter to use. No notary can alter his subscription and motto without judicial authority. The clerk also administers the declaration *de fideli administratione officii*, and gives the entrant a protocol-book containing ninety-one leaves, along with his commission. The whole charges of admission, including the stamp duty of £20, amount at present to £26, 19s. 6d. Every person practising as a notary requires to take out the same annual certificate or licence to practise as a law agent. But only one such certificate is required, although he be practising both as a notary and as a law agent. If a notary only, he is entitled not merely to exercise his properly notarial duties, but also to act as a conveyancer and to conduct all other legal business, except practise in Court.

SECTION 4.—NOTARIAL RECORDS.

677. The protocol-books above mentioned, though not kept by all notaries, are very regularly kept by most notaries in maritime towns for recording protests against wind and weather, as well as other protests, contracts, wills of foreign sailors, etc. When the first protocol-book is full, the owner sends it to the clerk to the admission of Notaries to be certified as having been produced to him, and the clerk issues a second protocol-book certified by him as such, of even date, and returns the old one to the notary therewith so that a regular record may be kept by the notary of all his acts. The notary being an officer "of European reputation"[3] and regarded with much respect in many countries, these books would always be valuable evidence in any foreign Court as containing the acts of the notary. These protocol-books have also been found of great assistance in tracing genealogies of old families, as they came into existence before the public records, and even subsequent to the institution of these records the protocols contain supplementary matters of importance.

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[1] 36 & 37 Vict. c. 63, s. 24.

[2] 59 & 60 Vict. c. 49, s. 2.

[3] *Cuninghame*, 1853, 12 D. 743.

Section 5.—In Relation to Land Rights.

678. The Titles to Land Act, 1858,[1] by substituting registration of feudal grants and dispositions for sasines deprived the notary of much of his prestige. But till the Conveyancing Act of 1924 [2] was passed he had still a considerable amount of business in the completion of title from the dead to the living by executing notarial instruments. The 1924 Act, however, rendered these unnecessary, and introduced a shorter notice of title to be used in their place where required.[3] As uninfeft trustees and others can validly convey without recording any such notice,[4] its use is likely to be limited; and as it can be executed by any law agent,[5] the notary's province has thus been further seriously impaired. The services of the notary also are no longer required in connection with the calling up of heritable securities [6] or in the execution of certificates respecting surplus on sales under those securities,[7] law agents again being entitled to officiate in all these matters.

679. The Act of 1924 further invaded the rights of the notary by providing [8] that "any deed, instrument, or writing granted after the commencement of the Act may, after having been read over to the granter, be validly executed on behalf of such granter if he from any cause, permanent or temporary, is blind or unable to write, by a law agent or notary public, or a justice of the peace." Law agents being thus enabled to execute deeds for disabled or blind persons, the notary as such is no longer an essential in this important class of cases. It has been held that a law agent duly enrolled, but who had not taken out his licence to practise, could validly execute a trust disposition and settlement on behalf of a granter who could not write.[9]

680. The functions of the notary above shewn to have been superseded related mostly to deliberative acts. But he still plays an important part in connection with deeds of disentail, being required to sign them along with the entailer who is seeking freedom.[10] And it has been held that the schedule of debts required to be produced in proceedings for disentail may be competently authenticated even by an English notary public.[11] Notaries also since 1868 have been entitled to act as commissioners for the Sheriffs in taking the evidence in services.[12] It is, however, understood that although he can competently take affidavits to inventories of personal estates and Government accounts affecting both real and personal property, a notary is not permitted to take the evidence of relationship required preliminary to confirmation dative being granted in small estates.

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[1] 21 & 22 Vict. c. 76.
[2] 14 & 15 Geo. V. c. 27.
[3] *Ibid.*, s. 6.
[4] *Ibid.*, s. 3.
[5] *Ibid.*, Schedule B.
[6] *Ibid.*, Schedule M.
[7] *Ibid.*, Schedule N.
[8] Sec. 18.
[9] *Stephen* v. *Scott*, 1927 S.C. 85.
[10] 11 & 12 Vict. c. 36, s. 32, and Schedule.
[11] *Kerr* (O.H.), 1927 S.N. 147; 1928, S.L.T. 52.
[12] 31 & 32 Vict. c. 101, s. 33.

Section 6.—In Mercantile Concerns.

681. The noting and protesting of bills are peculiarly notarial work. When payment of a bill or note is refused, the notary notes thereon the date with his initials and the letters N.P. and sometimes the initials of the witnesses. The protest for non-payment when extended must be signed by the notary making it.[1]

682. The execution of maritime protests is another specialty of the notary. Where a vessel in its voyage has been damaged by storm or heavy seas, or through fire, or other cause, the master on reaching port makes a protest before a notary and witnesses, in which the actual facts are averred. The notary keeps a note thereof in his protocol-book, and afterwards extends the protest if required. This declares or protests that the damage should not be attributable to the master or his crew, nor to any defect in the vessel or their management of it, and that the loss should fall on and be borne by the freighters or underwriters or whoever it may concern. Such documents are known as protests against the seas or wind and weather. But they are also used in cases of breach of charter-party and demurrage.[2]

683. Affidavits for bankruptcy purposes[3] as well as practically for all Inland Revenue forms may be sworn before a notary, and affidavits to be used in the High Courts in England may also be sworn before him.[4]

684. In authenticating the due execution of powers of attorney and other deeds to be used in our colonies or abroad, the notary public is in much request. The notary abroad, indeed, is a much more important functionary from an official point of view than he has ever been with us. In America notaries are appointed by the governors of the States, are State officers, and are concerned with the attestation of deeds and other business. American and Canadian deeds sent to this country for completion have almost invariably to be executed before a notary who attests same with his signature and official stamp or seal. The sealing should not be done by a signet ring impressed on wax, but by an embossing stamp cutting through the deed and paper seal stuck on top with the notary's name and "Notary Public" engraved upon it.

Section 7.—Acting for Persons under Disability.

685. Although notaries as such may not now require to act in those cases they can still competently do so. The form of docquet prescribed by the Act of 1924[1] is much shorter than formerly and is in these terms:—

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[1] See forms in Juridical Styles (Moveable Rights), p. 976 *et seq.*

[2] 45 & 46 Vict. c. 61, s. 51 (7).

[3] 3 & 4 Geo. V. c. 20, s. 21.

[4] Rules of Supreme Court, England, Order 38, rule 6.

> "Read over to, and signed by me for, and by authority of the above-named A. B., who declares that he is blind (or is unable to write), all in his presence, and in presence of the witnesses hereto subscribing.
>
> "C. D., law agent (or notary public), Edinburgh.
>
> "M. N., *witness.*
> "P. Q., *witness.*"

In a lengthy note the schedule explains that the law agent or notary has to sign each page of the deed, and the docquet is to be written on the last page and signed by the law agent or notary and the witnesses—the law agent or notary not requiring to sign above (as was often done) as well as below the docquet. Strict adherence to the form is recommended.

686. Decisions bearing upon the validity of notarial executions are still applicable, and *mutatis mutandis* will apply to law agents exercising the notarial functions committed to them. If there are two or more granters of the deed who cannot write, and if they have antagonistic interests, the same notary should not act for more than one.[2] Neither should the law agent of one party act as notary for the other.[3] In no case may a deed be executed notarially by a notary who takes any benefit under it, or is named trustee or executor[4] or agent[5]; the execution in such a case is absolutely invalid.

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[1] Sec. 18, Schedule I.
[2] *Graeme* v. *Graeme's Trs.*, 1868, 7 M. 14.
[3] *Lang* v. *Lang's Trs.*, 1889, 16 R. 591.
[4] *Fernie* v. *Fernie's Tr.*, 1863, 1 M. 291; *Chisholm* v. *Macrae*, 1903, 11 S.L.T. 416.
[5] *Newstead* v. *Dansken*, 1918, 1 S.L.T. 136.

NOTE.

See PRACTICE AND PROCEDURE.

NOTICE OF ACCIDENT.

See ACCIDENT.

NOTIFICATION OF BIRTH.

See MIDWIVES; MEDICINE AND PHARMACY.

NOTIFICATION OF DISEASE.

See FACTORIES AND WORKSHOPS; PUBLIC HEALTH.

NOTOUR BANKRUPTCY.

See BANKRUPTCY.

NOVATION.

See OBLIGATION.

NOVODAMUS, CHARTER OF.

See CHARTER (FEUDAL).

NUDUM PACTUM.

See CONTRACT.

NUISANCE AND NON-NATURAL USE OF PROPERTY.

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SECTION 1.—GENERAL.

SUBSECTION (1).—*Introductory.*

687. The word "nuisance" (late Latin, *nucamentum*, *nocentia*, from *nocere*, to hurt) signifies in popular language "what annoys or is offensive," and in this sense it is freely used by the legislature to describe a multitude of acts which have been made offences under the statutes dealing with public health, burgh police, and other matters of civil administration. Some of these statutory nuisances are also nuisances at common law, *e.g.* certain acts relating to the pollution of water and the emission of smoke. The term is used also in legal language to describe certain uses of incorporeal property which interfere with the enjoyment by others of their property. In this sense the word is applied by some lawyers only to infringements of what are known as the natural rights of property, such as are inherent in or flow from the concept of "ownership," while by others the term is used in a wider sense, to include interferences with acquired rights such as servitudes.

688. The single common factor which appears in these different uses of the term is the idea of hurtfulness. It is obvious that no useful definition can be framed of a term which comprehends acts differing so widely in character as the pollution of air and water, the obstruction of a stream, the keeping of insanitary property, the emission of smoke, and the removal of support to land. Professor Bell uses the term nuisance in its widest sense, for he describes it thus:[1] "Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood; whatever is intolerably offensive to individuals in their dwelling-houses, or inconsistent with the comfort of life whether by stench . . . by noise . . . or by indecency . . . is a nuisance"—a description sufficiently wide to include the whole list of statutory nuisances contained in the Public Health, Burgh Police, and other statutes.

689. The distinction which obtains in England between public and private nuisances has not been adopted in Scotland, where nuisances are divided into common law and statutory nuisances. With regard to those nuisances which relate to "neighbourhood," the principles of law which regulate the subject are the same in both countries. In *Fleming* v. *Hislop*[2] Lord Fitzgerald said: "There is no difference in this respect between the law of England and the law of Scotland; they rest upon the same principle; both acknowledge the undoubted right of the proprietor to the full and absolute use of his own property; but there is this restraint or limitation imposed for the protection of his neighbour,

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GENERAL AUTHORITIES.—Rankine on Land-Ownership, 4th ed.; Ferguson, Law of Water and Water Rights in Scotland; Garrett on Nuisances, 3rd ed.; Pearce and Weston, Law of Nuisance; Glegg on Reparation, 2nd ed.; Beven on Negligence; Pollock on Torts.

[1] Prin., s. 974.

[2] 1886, 13 R. (H.L.) 43, at p. 48.

that he is not so to use his property as to create that discomfort or annoyance to his neighbour which interferes with his legitimate enjoyment."

SUBSECTION (2).—*Natural Rights of Property.*

690. In virtue of the natural rights of property, an owner is entitled "to do what he pleases with his property within its limits, and to derive from it all the services of which it is capable."[1] The standard is that of comfortable enjoyment,[2] and so long as an owner conforms thereto it matters not that his acts of ownership cause inconvenience to his neighbours. If he is not guilty of fault or negligence, or if his act is not in itself illegal, he may "exhaust, convert, or destroy the substance of his ground, whether surface or internal materials." He may dig or build on any part of his land though the consequence should be to stop his neighbour's lights, but not to the danger of property or life. But he must not withdraw the natural support, lateral or vertical, which exists as a common law right.[3]

691. These natural rights of property imply, however, corresponding duties on the part of owners and possessors of property, in relation to their neighbours and to the public generally. Thus, while ownership is exclusive in its nature, and is jealously guarded by the law, by the nature of things it cannot be absolutely exclusive. The same air and the same water pass from one man's property to that of another; operations in the soil of one owner's property may affect injuriously conditions in another man's land. Hence arises the necessity for the regulation by law of the uses and enjoyment of the subjects owned. That a person should so pollute the air or water as to cause discomfort to his neighbour, that he should so divert the course of a stream as to cause it to overflow his neighbour's land, or rob him of the flow to which he has been accustomed, would be inconsistent with the natural rights of property. The so-called exclusive rights of property must be exercised conformably with the rights of others.

SUBSECTION (3).—*Infringements of Natural Rights.*

692. The manner of user prescribed by law is "*sic utere tuo ut alienum non lædas*," "which necessarily imposes on the proprietor the duty of exercising that measure of care which will avoid injury accruing to his neighbour from his house" or lands.[4] The following situations may present themselves: (1) where damage is caused to a neighbour by the natural use of one's property, (*a*) without, and (*b*) with negligence;

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[1] Bell's Prin., ss. 962, 963.

[2] *Walter* v. *Selfe*, 1851, 4 De G. & Sm. 315; *Hart* v. *Taylor*, 1827, 4 Mur. 313.

[3] Bell's Prin., ss. 964, 965.

[4] *Cameron* v. *Young*, 1908 S.C. (H.L.) 7; [1908] A.C. 176, per Lord Robertson. The maxim lays down no rule of law. It is characterised by Erle J. in *Bonomi* v. *Backhouse*, 1858, E.B. & E. 637, 639, 643; 1861, 9 H.L.C. 511, as "mere verbiage. A party may damage the property of another where the law permits, so that the maxim can never be applied till the law is ascertained, and where it is the maxim is superfluous."

(2) where damage results from a non-natural use of property not necessarily illegal; and (3) where damage results from the illegal use of property. A person is not liable for the result of the natural use of his land if there is no negligence.[1] Negligence in the natural use of property is not treated of in this article.[2] The second class of cases arises where an owner of land puts his land to an extraordinary and non-natural use, not indeed an unlawful use, yet with great potentiality of mischief to his neighbour, as where he brings some *opus manufactum* to his land, *e.g.* a reservoir for water. He may be most careful in the use of the work, yet, if damage to a neighbour results, the law will impute negligence, not in the user of the work, but in bringing it to the land, and hold its owner liable for the consequences of that negligence. In the third case, which is nuisance proper, the law looks not at negligence but at the illegality of the act. In an issue for the jury in an action of nuisance the question of negligence is not raised.[3]

SUBSECTION (4).—*Neighbourhood.*

693. In dealing with the law of nuisance and non-natural use of property, it is necessary to note that "neighbourhood" does not necessarily imply contiguity of estates. Where the lands of one proprietor are so situated with relation to another that each has an interest, in virtue of his ownership, to do certain things or to compel his neighbour to refrain from doing certain things, even although the lands are not contiguous, the law of neighbourhood applies.[4] In an English case it was argued that the rule of *Rylands* v. *Fletcher*[5] applied only as between adjacent proprietors, but the contrary was decided by the Court of Appeal,[6] which, however, did not lay down any definite rule as to the degree of contiguity necessary for the operation of the rule. The use of a highway in the proximity of the complainer's lands may cause nuisance, and the obnoxious use thereof may not be confined to operations *in solo*, but may arise from the passage of vehicles along the highway obstructing or making its use dangerous to neighbours or to the public.[7] *E converso* the lawful use of a highway is protected from unlawful acts on the part of neighbours and the public.[8]

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[1] Bell's Prin., s. 962 *et seq.*; *Laurent* v. *Lord Advocate*, 1869, 7 M. 607.

[2] See NEGLIGENCE, p. 241, *ante*.

[3] *Cooper & Wood* v. *North British Rly. Co.*, 1863, 1 M. 499; 2 M. 116; *Gardner* v. *Fraser*, 1860, 22 D. 1501; *Duke of Buccleuch* v. *Cowan*, 1866, 4 M. 475, at p. 481; *Earl of Southesk* v. *Inch Bleaching Co.*, 1881, 8 R. 573; *Hay* v. *Waldegrave Leslie*, 1896, 4 S.L.T. 124; Maclaren, Court of Session Practice, p. 576.

[4] Rankine, Land-Ownership, 4th ed., p. 370.

[5] 1866, L.R. 1 Ex. 265; L.R. 3 H.L. 330. See para. 694, *infra*.

[6] *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772, per Lord Sumner at p. 779.

[7] *Slater* v. *A. & J. M'Lellan*, [1924] S.C. 854, per Lord Pres.; *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276; *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138.

[8] *Ogston* v. *Aberdeen Tramways Co.*, 1896, 24 R. (H.L.) 8.

SECTION 2.—NON-NATURAL USE OF PROPERTY.

SUBSECTION (1).—*The Rule of "Rylands* v. *Fletcher."*

694. Certain uses of property are regarded by the law as non-natural, and involve special liabilities on the user, who acts at his peril; for if material damage results to his neighbours the law will impute negligence to him. Thus, to take a time-honoured illustration, if a person keeps dangerous wild beasts on his property, he does nothing unlawful, but if they escape and injure his neighbour, the owner has committed a wrong, and is liable in damages; or, if he builds a private reservoir on his lands and the reservoir bursts, it is no answer that he availed himself of the best engineering advice when he built the reservoir, and that he exercised careful supervision afterwards. In both cases he put his property to uses which the law regards as non-natural, such as implied fault or negligence towards his neighbour. No complaint of the neighbour would have availed him, unless indeed it was patent or highly probable that injury would ensue, in which case interdict or other remedy would have been available. In short, the non-natural user is a guarantor against damage to his neighbour.

695. In *Kerr* v. *Earl of Orkney*,[1] following earlier Scots cases,[2] the rule, now known in England as the rule of *Rylands* v. *Fletcher*,[3] was laid down with precision, and has been approved by the House of Lords.[4] There, a party had erected a structure in the bed of a stream for the purpose of collecting the water in a dam, and it was found in law that he was bound so to erect it as to render all property lower down the stream as secure as it was before; and that, the dam having given way and done injury, even though in consequence of an extraordinary fall of rain, he was liable in damages, and no proof of care in the construction of the work could relieve him unless the accident could be attributed to a *damnum fatale*. The principle is, in the words of the Lord Justice-Clerk, "that if a person chooses upon a stream to make a great operation for collecting and damming up the water for whatever purpose, he is bound, as the necessary condition of such an operation, to accomplish his object in such a way as to protect all persons lower down the stream from all danger. He must secure them against danger. It is not sufficient that he took all the pains which were thought at the time necessary and sufficient. They were exposed to no danger before the operation. He creates the danger, and he must secure them against danger, so as to make them as safe notwithstanding his dam as they were before. . . . When an operation is made which involves great risk to the safety of life and of property, the condition on which alone that can be allowed which causes such risk is complete protection." He makes an exception in the case of *damnum fatale*, but points out that extraordinary falls of rain "in our climate" are not of the nature of *damnum fatale*.

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[1] 1857, 20 D. 298.

[2] *Macaulay* v. *Buist & Co.*, 1846, 9 D. 245; *Samuel* v. *Edinburgh and Glasgow Rly. Co.*, 1850, 13 D. 312.

[3] 1866, L.R. 1 Ex. 265; 1868, L.R. 3 H.L. 330.

[4] Vide *Caledonian Rly. Co.* v. *Greenock Corporation*, 1917 S.C. (H.L.) 56; *Tennent* v. *Earl of Glasgow*, 1864, 2 M. (H.L.) 22.

696. In *Chalmers* v. *Dixon*,[1] the refuse from an ironstone pit, consisting of an enormous amount of combustible materials, was piled up on the owner's premises, and in some unexplained way took fire and by emitting noxious vapours caused damage to a neighbouring farm. It was held that the defenders by forming such an *opus manufactum* had rendered themselves liable for the consequences without proof of specific fault. The Lord Justice-Clerk said: "The question thus arises whether a man who conducts an operation on his own premises, lawful in itself, but which has a tendency to injure his neighbour, is liable for any injurious results unless specific fault be alleged and proved. I think that the answer to this is to be found in the distinction between the ordinary uses of property, to which a neighbour is bound to submit, although they may cause incidental injury to him, and the construction of an *opus manufactum*, the bringing an article upon the land which creates a hazard which did not exist before." And he bases the liability on fault: "If a man puts upon his land a new combination of materials which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable, if injury occurs, for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground."

697. In *Rylands* v. *Fletcher*,[2] the occupier of lands had built, by a competent engineer and contractor, a reservoir which burst and flooded some old pitshafts. The water penetrated by disused workings and flooded a mine which was being worked. The defendant, having accumulated this body of water, was held liable, without proof of fault, for the consequences of its escape. It follows that in the case of such erections the owner must guarantee his neighbour against loss resulting from their not being safe. The mere fact that the structure gave way establishes in law his original failure of duty. Extraordinary occurrences will not excuse him[3] unless indeed they amount to *vis major*—act of God.[4]

698. Where a landowner did not bring the materials on to his lands but has only carried out changes on the existing substance thereof, he is liable only on proof of negligence.[5] Why he should be liable for the bursting of a reservoir and not for the escape of water from a mine is difficult to say. The former is held to be a non-natural, the latter a natural use of land. A fall of rock due to natural causes where the owner did not put his land to any non-natural use is not a nuisance.[1]

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[1] 1876, 3 R. 461; and see per Lord Blackburn in *Rylands* v. *Fletcher*, 1866, L.R. 1 Ex. 265, at p. 259; approved on appeal, 1868, L.R. 3 H.L. 330.

[2] 1866, L.R. 1 Ex. 265; 1868, L.R. 3 H.L. 330.

[3] *Tennent* v. *Earl of Glasgow*, 1864, 2 M. (H.L.) 22, Lord Westbury at p. 26.

[4] *Rylands* v. *Fletcher*, 1866, L.R. 1 Ex., per Lord Blackburn at p. 269.

[5] *Smith* v. *Fletcher*, 1874, L.R. 9 Ex. 64.

699. Certain acts are on the border line between natural and non-natural use, *e.g.* the use of a dangerous vehicle on the highway.[2] Muir-burn is necessary for the enjoyment of certain shooting properties, but must be exercised with very great care as so to prevent fire spreading to neighbouring estates. Yet the mere fact that fire has spread to another estate does not determine liability for damage; negligence must be established positively.[3] But the burning of brush and heath in order to clear the ground is an act of extraordinary administration and done at the owner's peril.[4]

700. The rule of *Rylands* v. *Fletcher* is now regarded as a general rule of liability for keeping and collecting dangerous things.[5] It applies to the discharge of electric current so as to injure delicate electrical instruments or operations in neighbouring lands.[6]

Subsection (2).—*Operations in Mines.*

701. The principle that a proprietor is entitled to all reasonable enjoyment and use of his property is well exemplified in the law regulating the drainage of mines. "There can be no doubt," says Lord President Inglis in a well-known judgment, "on the one hand, that the owner of a mine is entitled to work out the minerals without regard to the interests of his neighbour, so long as he confines his operations to his own grounds and resorts to no extraordinary means of working; and if the effect of working out these minerals be to throw water down upon his neighbour, who lies upon a lower level than himself, that is just the natural servitude which the lower heritor below ground must submit to, as the lower heritor above ground does; and, on the other hand, the lower heritor, if he desires to protect himself against the invasion of water from above, must secure that protection by leaving a sufficient barrier of his own minerals upon the march to prevent the water finding its way to him."[7] The flow of water must not be thrown by extraordinary methods of working upon the lower proprietor.[8]

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[1] *Pontardawe Rural District Council* v. *Moore-Gwyn*, [1929] 1 Ch. 656.

[2] *Slater* v. *A. & J. M'Lellan*, 1924, S.C. 854.

[3] *Macintosh* v. *Mackintosh*, 1864, 2 M. 1357, per Lord Neaves.

[4] *Keith* v. *Kerr*, 10th June 1812, F.C., and comment on that report by the Lord Justice-Clerk in *Baird* v. *Hamilton*, 1826, 4 S. 790 (N.E.) 797.

[5] Liability for Dangerous Things, Charlesworth, p. 68; *Belvedere Fish Guano Co.* v. *Rainham Chemical Works, Ltd.*; *Ind Coope & Co.* v. *Do.*, [1920] 2 K.B. 487 (storing high explosives on land).

[6] *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381.

[7] *Durham* v. *Hood*, 1871, 9 M. 474, 479; see also *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418, 1425; *Smith* v. *Kenrick*, 1849, 7 C.B. 515; *Baird* v. *Williamson*, 1863, 15 C.B. (N.S.) 376; *Wilson* v. *Waddell*, 1876, 2 App. Cas. 95.

[8] *Westminster Brymbo Coal and Coke Co.* v. *Clayton*, 1866, 36 L.J. Ch. 476; *Baird* v. *Monkland Iron and Steel Co.*, *supra*.

SUBSECTION (3).—*Right to Protect Property.*

702. It is within a person's rights to protect his own land and secure his own enjoyment thereof by driving off noxious creatures and things even if the result is that they congregate on a neighbour's land.[1] In doing so he is not acting unreasonably. Thus if a dog is kept to keep down or chase away vermin, and the vermin lodge on the neighbour's ground, the keeper of the dog is not liable for damage done to his neighbour by the vermin. It would be otherwise if he deliberately let loose vermin upon his neighbour's land and damage ensued. Nor does liability ensue if a proprietor takes steps to prevent an overflow of flood-water upon his lands, even if by doing so he causes that flood-water to flow on his neighbour's land;[2] for in protecting his lands he is doing what is necessary for their reasonable enjoyment. But he may not harm his neighbour by altering the normal flow of the stream. Each owner may exercise these and similar rights to ensure the enjoyment of his property.

SUBSECTION (4).—*Exceptions to the Rule of "Rylands* v. *Fletcher."*

703. The rule laid down in *Kerr* v. *Earl of Orkney*[3] and *Rylands* v. *Fletcher*[4] is subject to certain exceptions.[5] The rule applies only to things which are brought or kept on the defender's land, and does not apply to things which are naturally there, *e.g.* vermin, noxious weeds, natural accumulations of water, etc. The owner or occupier is under no duty to prevent their escape, nor is he liable for damage resulting therefrom.[6] But if he has artificially accumulated such hurtful things, (*e.g.* if he keeps a rabbit-warren and the rabbits do extraordinary damage to his neighbour) the owner is liable.[7]

704. The rule is not applicable to the escape of noxious things brought or kept on the defender's premises with the complainer's consent, nor to cases of damage done by the act of a stranger which could not reasonably have been foreseen and guarded against,[8] nor where the damage arises from *damnum fatale* (*i.e.* "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility"),[9] act of God or *vis major*, or in consequence of the pursuer's fault.[10]

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[1] *Greyvensteyn* v. *Hattingh*, [1911] A.C. 355.

[2] *Neild* v. *London and North-Western Rly. Co.*, 1874, L.R. 10 Ex. 4.

[3] 1857, 20 D. 298.

[4] 1866, L.R. 1 Ex. 265; 1868, L.R. 3 H.L. 330.

[5] See also para. 725, *infra*.

[6] *Giles* v. *Walker*, 1890, 24 Q.B.D. 656 (commented on in Glegg, Reparation, p. 363, n. (2)); *Whalley* v. *Lancashire and Yorkshire Rly. Co.*, 1884, 13 Q.B.D. 131 (escape of water); Salmond, Torts, p. 351.

[7] *Farrer* v. *Nelson*, 1885, 15 Q.B.D. 260.

[8] *Box* v. *Jubb*, 1879, 4 Ex. D. 76; *Wilson* v. *Newberry*, 1871, L.R. 7 Q.B. 31.

[9] *Tennent* v. *Earl of Glasgow*, 1864, 2 M. (H.L.) 22, per Lord Westbury, pp. 25, 26, 27; Rankine, Land-Ownership, p. 375, and cases cited.

[10] Per Lord Blackburn in *Rylands* v. *Fletcher supra*; Bell's Prin., s. 970.

SECTION 3.—NUISANCE.

SUBSECTION (1).—*Definition.*

705. The legal wrongs hitherto dealt with relate to such non-natural use of property as implies a breach of duty on the part of the user. There exists, however, another type of case—that of nuisance—where the necessary and natural result of an act is to cause material damage to a neighbour, the act itself being illegal. In these cases negligence need not be established by positive evidence;[1] the law regards only the illegality of the act. The commission of the act which is a breach of a duty to a neighbour carries with it the right to a remedy except where the damage is immaterial, in which case the maxim *de minimis non curat prœtor* applies.

706. "Every landowner has a natural right to have the air which reaches his property free from undue pollution (by smoke, stenches, etc.), and undue vibration (noise). The question of the amount of allowable pollution and disturbance is one of circumstances. If property or health is materially affected the nuisance is undoubted, and must be abated. If it only makes the enjoyment of life and property uncomfortable much depends on the nature of the locality . . ."[2] "The infringement of these rights and of the relative restrictions is called nuisance, and gives rise to actions—first, of interdict, to prevent the threatened inception or further continuance of the illegal act; and, secondly, of restitution and damages, to repair the wrong already committed."[3]

SUBSECTION (2).—*Malice*—Æmulatio vicini.

707. It is laid down as a proposition in law in the older books that if a proprietor does an act, otherwise lawful, with the intention and result of causing injury, he acts *in œmulationem vicini* and commits a wrong. It is more than doubtful if that proposition is good law, and the authorities cited as supporting it hardly bear it out, and can be explained on other grounds, *e.g.* negligence, non-natural use of property, or nuisance.[4] In *Mayor of Bradford* v. *Pickles*,[5] Lord Watson said, "I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Chelmsford in *Chasemore* v. *Richards*.[6] The noble and learned Lord appears to have accepted a passage of Mr. Bell's Principles (s. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase '*in œmulationem vicini*' was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being *in æmulationem*, where it was not attended with offence or injury to the legal rights of his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landlord proceeded to burn limestone close to his march so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause for offence, the Court would probably grant an interdict. But the principle of *æmulatio* has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious."

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[1] *Duke of Buccleuch* v. *Cowan*, 1866, 4 M. 475; *Cooper & Wood* v. *North British Rly. Co.*, 1863, 1 M. 499; 2 M. 116.

[2] Ersk. Prin. ii. 9, 1A (Rankine's ed.).

[3] Rankine, Land-Ownership, 4th ed., p. 387.

[4] *Ibid.*, p. 381.

[5] [1895] A.C. 587, at p. 597.

[6] 1859, 7 H.L.C., at p. 388.

SUBSECTION (3).—*Classification of Nuisances.*

708. Nuisance may be caused to private individuals or to the general public; and the term is not applied to wrongs which fall under the law of trespass and of negligence. Nuisances are distinguished in Scots law as common law and statutory. The list of statutory nuisances is constantly increasing; the former category is more stationary in number, but is susceptible of an extension in its application coincident with changes in the social and industrial life of the nation.

709. Nuisance differs from trespass in respect that the latter implies a direct encroachment by one proprietor (or possessor) on the property of the other. To establish trespass it is not necessary to prove damage, for the right of ownership, being exclusive, negatives that requirement. Trespass is not an element of nuisance. To cause a substantial object to enter a person's land is trespass, not nuisance; but "where the thing is not material and tangible (such as electricity, noise, smell, or smoke), or where, though material and tangible, its entry is not the direct act of the defendant, but merely consequential on his act, the injury is not a trespass but a nuisance actionable on proof of actual damage. To plant a tree on another man's land is a trespass; but to allow it to spread its roots and branches across the boundary is a nuisance and not a trespass."[1]

SUBSECTION (4).—*Materiality and Standards.*

710. To constitute nuisance the act complained of must be "such as to cause or likely to cause material discomfort and annoyance."[2] "In a question of nuisance the first point is, whether the product of the work is noxious or unwholesome; but though it may not be absolutely noxious, still, if it renders the enjoyment of life substantially uncomfortable either in the pursuer's house or grounds, it is a nuisance. . . . Every question of this sort is one of degree and must depend on the evidence. It is not every trivial inconvenience; it must be substantial."[1] Explaining his use of the word "material" in the passage first cited, the Lord Chancellor said, "It excludes any sentimental, speculative, trivial discomfort or personal annoyance of that kind—a thing which the law may be said to take no notice of and have no care for." [2] Actionable nuisance thus arises chiefly if life or health is endangered or if sensible personal discomfort is caused, or property is injured to a material extent by the operations complained of. It is pointed out by Lord Westbury [3] that "it is very desirable to mark the difference between an action brought on the ground that the alleged nuisance produces material injury to the property, and an action brought on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort." Whether the latter condition amounts to a nuisance depends, he explains, on the circumstances of the place where the thing complained of actually occurs. But a very different consideration arises where there is material injury to property, for then the "submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise for the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of property." [3]

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[1] Salmond on Torts, 7th ed., p. 235 *et seq.*

[2] *Fleming* v. *Hislop*, 1886, 13 R. (H.L.) 43, per Selborne L.C. (Burning of Blaes).

711. The application of this general rule is attended with much difficulty, for that which would undoubtedly constitute a nuisance in one locality might not be so regarded in a locality of different character. Thus in industrial districts, where the homes of workmen are often situated close to their places of work, more noise and discomfort would be tolerated, if arising out of their occupations, than would be tolerated in a purely residential district. But even in industrial districts new and additional noises, stenches, or other forms of annoyance, if substantial, will be restrained.[4] Every case must be decided with special regard to its own particular circumstances; but the neighbours are entitled to reasonably comfortable standards of existence. At common law a sick person is not entitled to greater immunity than one who is well, but in such cases protection is sometimes provided by statute by compelling special precautions to be taken, *e.g.* for the prevention of noise.[5]

712. If an act authorised by statute to be done can be performed in only one way, and no duty to avoid the creation of a nuisance in doing the act is imposed, "standards of comfort" have no application, for the act is lawful.[1] Where the right to create a nuisance has been acquired by agreement or prescription then such persons as are subject to the agreement or the prescription cannot resist the act so long as it conforms to the right which has been acquired against them; but others who are not so bound may object to the act.

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[1] *Hart* v. *Taylor*, 1827, 4 Mur. 307, per Lord Chief Commissioner Adam.

[2] *Fleming* v. *Hislop*, 1886, 13 R. (H.L.) 43; see also *Walter* v. *Selfe*, 1851, 4 De G. & Sm. 315.

[3] *St. Helen's Smelting Co.* v. *Tipping*, 1865, 11 H.L.C. 642.

[4] *Rushmer* v. *Polsue & Alfieri*, [1906] 1 Ch. 234, per Cozens Hardy L.J. at p. 250; [1907] A.C. 121; *Maguire* v. *Charles M'Neil, Ltd.*, 1922 S.C. 174; *Anderson* v. *Aberdeen Agricultural Hall Co.*, 1879, 6 R. 901.

[5] Burgh Police Act, 1903 (3 Edw. VII. c. 33), s. 53.

713. Regard cannot be had to abnormal sensitiveness of individuals in regard to offensive things. The standards set must conform to those reasonably to be expected in the particular locality. And the same rule applies where harm by nuisance is alleged to special trades or to delicate instruments, where no damage would result to ordinary trades or instruments.[2] If a person dedicates his property to operations of a specially delicate nature, he must take the risk upon himself and not lay on his neighbours a burden greater than the reasonable use of their property by them would impose.

SUBSECTION (5).—*Locus.*

714. The act which gives rise to a nuisance is usually done by the person who is owner or occupier of neighbouring land.[3] Neighbouring land in this connection includes a public highway,[4] a navigable river,[5] or a place of public resort, for members of public using such places are occupiers thereof for the time being. Thus in *Slater* v. *A. & J. M'Lellan*,[4] the Court found that "the use by the defender on the public road adjoining the pursuer's property of said locomotive wagon and trailer carrying a load ignitible by sparks from the funnel of the locomotive, constituted a dangerous nuisance to the pursuer's property." Proximity, however, is a relative term depending on the circumstances of the case, *e.g.* a nuisance may be caused by pollution entering a river at a point many miles distant from the complainer's property; and smoke may be offensive though coming from a considerable distance.

SECTION 4.—RESTRAINT OF NUISANCE.

SUBSECTION (1).—*Title to Sue.*

(i) *Landowner; Tenant.*

715. An action for restraint of nuisance at common law may be sued by the beneficial owner of the lands or premises affected by the nuisance. It is immaterial whether the owner is in actual possession or not.[6] Although the premises are occupied by a tenant the landlord's interest to protect the letting value of his tenement remains and is sufficiently strong to entitle him to apply for interdict in respect of operations by a third party, complained of by his tenant, and lowering or calculated to lower that value.[1] The law of Scotland seems to differ in this respect from English law, under which "an owner who is not in possession cannot sue for a nuisance as such, and *per se*."[2] It does not derogate from the landlord's title to sue that the nuisance is a transitory one.[3]

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[1] *Lord Blantyre* v. *Clyde Navigation Trs.*, 1871, 9 M. (H.L.) 6.

[2] *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381.

[3] See para. 693, *supra.*

[4] *Benjamin* v. *Storr*, 1874, L.R. 9 C.P. 400; *Slater* v. *A. & J. M'Lellan*, 1924 S.C. 254.

[5] *Attorney-General* v. *Great Eastern Rly. Co.*, 1871, L.R. 6 Ch. 572.

[6] *Fleming* v. *Ure*, 1750, Mor. 13159; *Fraser's Trs.* v. *Cran*, 1877, 4 R. 794; 5 R. 290; 1879, 6 R. 451.

716. A tenant[4] has a good title to object to the acts of third persons of the nature of nuisance or non-natural use of property provided his interest as tenant is affected. Cases may be figured where such acts affect the tenant alone, or the landlord alone, or both. The title to sue follows the interest in all these cases; and it follows that in the third case both landlord and tenant may be pursuers.[5] The tenant's interest relates to the comfortable possession of the subjects; the landlord's to more permanent injuries,[6] including such as affect the letting value of the subjects, and to such injuries to them as are based on an assertion of adverse rights. If nuisance results not from the condition of the premises let but from the misuse of them by the tenant, he is the proper defender. If the use is normal and usual, and the condition of the structure causes injury to a neighbour, the landlord is liable.[7] If the nuisance arises during the lease the landlord is liable only if the nuisance necessarily resulted from the ordinary use of the subjects let.[8]

717. A landlord may interdict his tenant from committing a nuisance on the subjects let.[9] In *D'Eresby's Trs.*[9] the title of the complainers, the landlords, was not challenged by respondents, against whom interdict was sought for alleged pollution of the subjects let. A superior has a title to interdict a vassal from committing a nuisance.[10] The proprietor of salmon fishings in a river is entitled to interdict pollution which causes injury to his fishings, and the proprietor of salmon fishings in the sea has a title to prevent pollution by sewage which damages his fishings, even although the sewage operations have been sanctioned by the Board of Trade.[11] The title of a feuar to sue his superior and a lessee of the superior has been sustained in an action of nuisance;[12]

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[1] *M'Ewen* v. *Steedman & M'Alister*, 1912 S.C. 156; *Harvie* v. *Robertson*, 1903, 5 F. 338, per Lord Adam at p. 344, and Lord Kinnear at p. 346.

[2] Salmond on Torts, 7th ed., p. 259; Rankine on Leases, 3rd ed., p. 712 *et seq.*

[3] *M'Ewen*, *supra*, per Lord Dundas at p. 163; *Heriot* v. *Foulds*, 31st January 1804, F.C.; Mor. 15255, where landlord who had let his coal interdicted his tenant.

[4] See Rankine on Leases, 3rd ed., p. 710 *et seq.*; *Fleming* v. *Gemmill*, 1908 S.C. 340.

[5] *Jolly* v. *Brown*, 1828, 6 S. 872; *Baird & Co.* v. *Kilsyth Feuars*, 1878, 6 R. 116.

[6] *Stewart* v. *Stephen*, 1877, 4 R. 873; *Chalmers* v. *Dixon*, 1876, 3 R. 461; *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

[7] *Weston* v. *Potterrow Tailors*, 1839, 1 D. 1218; *Mathieson's Factor* v. *Aikman's Trs.*, 1910 S.C. 11.

[8] *M'Callum* v. *Forth Iron Co.*, 1861, 23 D. 729.

[9] *Mowbray* v. *Ewbank*, 1833, 11 S. 714; *D'Eresby's Trs.* v. *Strathearn Hydropathic Establishment Co.*, 1873, 1 R. 35 (Irrigation Water).

[10] *Countess of Seafield* v. *Kemp*, 1899, 1 F. 402.

[11] *Duke of Richmond and Gordon* v. *Burgh of Lossiemouth*, 1904 (O.H.) 12 S.L.T. 166.

[12] *M'Callum* v. *Forth Iron Co.*, 1861, 23 D. 729 (Calcining).

and a tenant has a title to interdict his landlord,[1] and without consent of his landlord may interdict a neighbouring proprietor from causing nuisance.[2] Where both interests are affected both may sue in the same action. One of several heritable proprietors *pro indiviso* has a good title to protect his property from nuisance.[3] If damages are claimed there must be separate conclusions for damages, and separate issues.[4]

718. It matters not that the complainers' right of ownership stands on a statutory title. Thus the title of the Caledonian Railway Company as proprietors of the Forth and Clyde Canal was not challenged in an action of interdict against polluting a stream which flowed into their canal; and statutory trustees have a good title to sue for the removal of nuisances affecting the subject of their trust,[5] *e.g.* for the removal of a barbed wire fence erected by a proprietor of lands adjoining a public road.[6]

(ii) *Members of the Public.*

719. Irrespective of those relationships which arise out of contract or other acquired right, or rest on statute, members of the public have a title to take legal action for the prevention or removal of nuisances, if injury to them can be qualified. Notwithstanding Lord Cottenham's remark that "what is known under the denomination of a popular action forms no part of the law of Scotland," the title of a member of the public in Scotland either to sue or to defend an action for the protection of a public right, whether the attack is by those entrusted with the duty of protecting that right or by third parties, is good.[7] It is not necessary that each pursuer, where there are several, should have to establish personal damage, so long as the public issue is substantially raised.[8] But more than a mere passing residence is required to qualify a title to sue as an inhabitant.[8] The leading case on this subject is *Ogston* v. *Aberdeen Tramways Co.*[9] The company, which had statutory power to use the city streets for their traffic, were in the practice of removing snow from their tramway lines by means of a snow-plough, and of afterwards scattering salt upon the lines. These operations were proved to have created a nuisance to the complainer and to the public using the streets for horse traffic. It was argued that the town council had the responsibility and duty imposed upon them of seeing that the roads were properly managed, and that if the inhabitants were of opinion that this duty was not performed they had the remedy in their own hands at the elections. But it was pointed out by Lord Watson [1] that the streets of Aberdeen were open to all the inhabitants of the realm, who have the same rights of user as the ratepayers themselves, and that "it is not a matter of course that the persons aggrieved by a nuisance must be municipal electors." The town council was not a party to the case, and the title of the member of the public was sustained and interdict granted. In *Fergusson* v. *Pollok* [2] the title of a member of the public was sustained where the complaint was that the public safety on a public road and on the foreshore was endangered by the use of a rifle range.

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[1] *Johnstone* v. *Constable*, 1841, 3 D. 1263 (Printing Machinery).

[2] *Hamilton* v. *Tennant & Co.*, 1839, 1 D. 502 (Noxious Vapours); *Fleming* v. *Gemmill*, 1908, S.C. 340; *Jolly* v. *Brown*, 1828, 6 S. 872; *Young* v. *Colquhoun*, 1830, 8 S. 959.

[3] *M'Culloch* v. *Wallace*, 1846, 9 D. 32, per Lord Cunninghame (Ordinary).

[4] *Harkes* v. *Mowat*, 1862, 24 D. 701; *Smyth* v. *Muir*, 1891, 19 R. 81, per Lord Kinnear, p. 88; *Mitchell* v. *Grierson*, 1894, 21 R. 367; *Brims & Mackay* v. *Pattullo*, 1907 S.C. 1106.

[5] *Caledonian Rly. Co.* v. *Baird & Co.*, 1876, 3 R. 839; *Mags. of Edinburgh* v. *Edinburgh, Leith and Granton Rly. Co.*, 1847, 19 Sc. Jur. 421.

[6] *Elgin County Road Trs.* v. *Innes*, 1888, 14 R. 48.

[7] *Gardner* v. *Fraser*, 1860, 22 D. 1501.

[8] *Ewing* v. *Glasgow Commrs. of Police*, 1839, M'L. & R. 847, 860.

[9] 1895, 23 R. 340; 1896, 24 R. (H.L.) 8; *Fergusson* v. *Pollok*, 1901, 3 F. 1140 (Rifle Range, Foreshore, Public Road); *Adam* v. *Police Commrs. of Alloa*, 1874, 2 R. 143.

(iii) *The Procurator-Fiscal.*

720. At common law only persons directly concerned (including members of the public) have a title to bring proceedings for the removal or abatement or prevention of a nuisance, and the proceedings can only be taken in a civil court. It sometimes occurs, however, that nuisances dangerous to the public arise, *e.g.* where buildings become dilapidated, or a water-course dangerous, and that no person comes forward to insist on a remedy. Such cases are sometimes reported to the Crown Office by the procurator-fiscal, who is occasionally authorised by the Lord Advocate to make application to the Sheriff by petition to ordain those responsible for the nuisance to remove or abate it. The Lord Advocate is naturally chary about giving such authority, and it seems more than doubtful whether he has power to do so. The matter does not seem to have been thoroughly tested in the Courts. In *Stevenson* v. *Magistrates of Hawick*,[3] the Procurator-Fiscal of the Sheriffdom lodged a petition in the Sheriff Court against (1) millowners who owned a mill lade, and (2) the burgh magistrates, who owned the public bleaching green through which the lade ran, to have the former ordained to fence it, on the ground that it was a danger to the public. Only the magistrates appeared to defend, and they did not question the instance in the petition, which was laid at common law, and not under any statute. The Second Division of the Court of Session, affirming the Sheriff, ordained the millowners to fence the lade; but, as pointed out by the judges, no plea was taken that the instance was bad, although they thought that perhaps the fiscal might competently bring the petition in the public interest. "It is not our duty to find out objections," said Lord Neaves, "unless it is quite clear that the application is incompetent." "It will require a case of real danger to sanction his interference," said Lord Benholme, who added, "I will not attempt to lay down any general definition of when the fiscal is to step in." If such power exists, then the Lord Advocate would have some such powers to take action in regard to public nuisances as are vested in the Attorney-

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[1] 1896, 24 R. (H.L.) 15.

[2] 1900, 3 F. 1140.

[3] 1871, 9 M. 753.

General in England. But it is submitted that no such powers belong to him, and that no case exists where they have been authoritatively recognised as belonging to him.

SUBSECTION (2).—*Liability to be Sued.*

(i) *Liability of Owner or Tenant.*

721. The author of a nuisance is liable to be sued for the damage caused and for abatement during the period of his occupancy; and the person who continues a nuisance is responsible for the continuance so far as it results from his own acts or from his failure to abate the nuisance. It is his duty to discontinue or to abate the evil, but when it existed before his occupancy he is only liable for unreasonable failure to abate it.[1] In an English case it was said that in these circumstances the occupier is not liable if the complainer has not requested him to abate the nuisance.[2] It is no defence to a claim for damages that the originator of the nuisance does not now occupy the lands in which the evil arose, but after he has ceased to own or occupy the lands he cannot be held liable to remove or abate the nuisance.[3] If a person creates a nuisance on land not occupied by him he is liable for damage resulting from it and from its continuance, notwithstanding that he has no power to abate it.[4] For what period that liability extends has not been decided.[3]

722. When a nuisance is committed within his feu by a feuar, he is the party *prima facie* answerable, unless the superior has authorised by the feu-charter the commission of the nuisance, in which case he too may be made a party.[5] Where the nuisance results from the authorised use by feuars of a sewer belonging to their superior he is the proper defender.[6] Where a superior was proprietor and occupant of a vacant piece of ground on which a nuisance existed, caused by an offensive open drain into which the sewage matter from the houses of his feuars in the vicinity was discharged, he was held liable in an action at the instance of an inhabitant of the neighbourhood to remove the nuisance; and a motion by the superior for conjunction of the action brought by him against the parties whom he alleged to be responsible for the nuisance was refused.[7]

723. Possession, not ownership, is the ordinary ground of liability for nuisance;[8] but a landlord is liable for the continuance of a nuisance created by himself even although he has let the premises after its inception; and he is liable even if he did not create the nuisance, but let the premises with the nuisance existing upon them;[1] or if he authorises the tenant to commit it; or if the nuisance is due to a breach of the landlord's obligations to his tenant, *e.g.* where he fails to repair premises which he is bound to repair and nuisance results.[2] Where the claim arises from the defective condition of property let to a tenant, the test of liability is: Who had control and management of and the duty to repair the property? If the pursuer cannot ascertain this, he may convene both the landlord and the tenant, and if both defend, and he is successful against one of them, the unsuccessful defender may be liable for the expenses of the pursuer and of the other defender.[3]

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[1] *Barker* v. *Herbert*, [1911] 2 K.B. 633; *Attorney-General* v. *Tod Heatley*, [1897] 1 Ch. 560.

[2] *Penruddock's* Case, 1597, 5 Co. Rep. 100*b*.

[3] See Salmond on Torts, p. 276.

[4] Salmond on Torts, *ibid.*; *Dalton* v. *Angus*, 1881, 6 App. Cas. 740; *Thompson* v. *Gibson*, 1841, 7 M. & W. 456.

[5] *Mackay* v. *Greenhill*, 1858, 20 D. 1251; *Duke of Buccleuch* v. *Cowan*, 1866, 5 M. 214, per Lord Justice-Clerk Inglis at p. 218; *Fleming* v. *Gemmill*, 1908 S.C. 340.

[6] *Governors of Heriot's Hospital* v. *Dicksons Bros.*, 1826, 5 S. 94 (N.E. 87); affd. 1830, 4 W. & S. 1; *Scott* v. *Scott*, 1881, 8 R. 851; *Caledonian Rly. Co.* v. *Baird & Co.*, 1876, 3 R. 839.

[7] *Mackay* v. *Greenhill*, *supra*.

[8] *Gwinnell* v. *Eamer*, 1875, L.R. 10 C.P. 658.

(ii) *Liability for Acts of Servants and Agents.*

724. An owner or occupier is liable for nuisances committed by his servants or agents even although he was not privy to their commission. "It seems to me both common sense and law," said Lord Denman C.J., "that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants,"[4] and that liability may exist even where the master had forbidden the act.[5] But if one employ a servant or agent to perform an act which can be carried out in a legal way, and that person perform it so as to cause a nuisance, the employer is not responsible,[6] for presumably an agent is engaged to do lawful acts, and if, in seeking to carry out a lawful end, he does not use lawful means, he is acting beyond the scope of his authority, and his master is not liable. But clearly the owner of lands in which a nuisance is committed would be bound to remove or abate such nuisance.

(iii) *Liability of Owner for Acts of Strangers, Licensees, etc.*

725. An exception to the rule of *Kerr* and *Rylands* (that an owner is liable for damage resulting from an *opus manufactum* on his land) is that the owner is not liable for the act of a stranger[7] which causes a nuisance. A trespasser on the defender's land is a stranger, and so is any person over whom the defender has no control; but an independent contractor, even when acting beyond the scope of or in disregard of his authority, is not in the position of a stranger, and the occupier is responsible for his acts,[8] contrary to the general rule that an employer is not liable for the negligence of an independent contractor. The position of licensees lawfully upon the defender's property, with no authority to do unlawful acts, is more difficult, and the view has been expressed that for their acts, if causing nuisance, the occupier must be held responsible.[1]

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[1] Salmond on Torts, p. 268.

[2] *Pretty* v. *Bickmore*, 1873, L.R. 8 C.P. 401; *Robertson* v. *Stewarts & Livingstone*, 1872, 11 M. 189.

[3] Maclaren, Court of Session Practice, p. 270; *Kennedy* v. *Shotts Iron Co.*, 1913 S.C. 1143.

[4] *Rex* v. *Medley*, 1834, 6 C. & P. 292.

[5] *Rex* v. *Stephens*, 1866, L.R. 1 Q.B. 702.

[6] *Peachy* v. *Rowland*, 1853, 13 C.B. 182.

[7] *Box* v. *Jubb*, 1879, 4 Ex. D. 76 (overflow from reservoir); *Wilson* v. *Newberry*, 1871, L.R. 7 Q.B. 31 (yew-tree clippings); *Nichols* v. *Marsland*, 1875, L.R. 10 Ex., at p. 259, per Lord Bramwell.

[8] *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48.

SUBSECTION (3).—*Defences.*

(i) *Legalisation of Nuisance.*

726. The right to commit a nuisance may be created by agreement or by statute, and the right to object to a nuisance may be barred by acquiescence or lost by prescription.

727. Agreement may be express, or gathered from acquiescence in the acts complained of, thus establishing a personal bar against complaints. Mere delay short of the period of the negative prescription to assert a contrary right will not support the plea of prescription.[2] The acquiescence must be of such a kind as to be explicable only on the ground of consent. The familiar rules establishing personal bar operate here.[3] Acquiescence, to be effective, must amount to tacit consent, and necessarily implies knowledge on the alleged consenter's part of the existence of his right and of the facts on which the acquiescence is founded. It will be presumed that a person had full knowledge of his rights,[4] but that knowledge may be disproved; and it must be shewn, in establishing acquiescence, that the party consenting "has a right which would be available against that which he has permitted to be enjoyed." [5] A corporation may be bound by acquiescence, but the knowledge must be that of the corporation as a body and not that of individual members.[6] Means of knowledge is not actual knowledge; the fact must be present in the mind of the party.[7] Mere silence is not enough to infer acquiescence, unless indeed the conditions in Bell's exposition [8] are satisfied: "Where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right."

728. It is a good defence to an action of nuisance that the person whose right of property has been invaded has failed to object for forty years, the period of the negative prescription.[1] The result is the establishment of personal bar against the person claiming the right to object. But the term of prescription will not cover an increase of the nuisance over a shorter period.[2] The right thus acquired may be lost by agreement, express or implied from "cessation of user for a time—greatly short it may be of the prescription period, but sufficient in the circumstances to import definite abandonment."[3] The right to create a nuisance is, strictly speaking, not acquired by prescription, *e.g.* in the case of river pollution;[4] it is the right to object that is lost by acquiescence in the nuisance.

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[1] Salmond on Torts, p. 238; *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330; 1866 L.R. 1 Ex. 265; see, however, *Whitmores, Ltd.* v. *Stanford*, [1909] 1 Ch., at p. 438, per Eve J.

[2] See per Lord Kinnear in *County Council of Midlothian* v. *Pumpherston Coal Co.*, 1903, 6 F. 387, as to prescription of a right to pollute water.

[3] Bell's Prin., s. 946; Rankine, Land-Ownership, 4th ed., p. 398; Rankine, Law of Personal Bar and Estoppel, ch. iv.; and cases cited in these works.

[4] *Marquis of Abercorn* v. *Langmuir*, 20th May 1820, F.C. 135.

[5] *Earl of Beauchamp* v. *Winn*, 1873, L.R. 6 H.L., pp. 234–5, per Lord Chelmsford.

[6] *City of Edinburgh* v. *Paton & Ritchie*, 1858, 20 D. 731.

[7] *Wark* v. *Bargaddie Coal Co.*, 1856, 18 D. 772, at p. 775; *Dalmellington Iron Co.* v. *Glasgow and South-Western Rly. Co.*, 1889, 16 R. 523.

[8] Bell's Prin., s. 946; also s. 26; *Wark, supra*, and 1859, 3 Macq. 467, at p. 480.

(ii) *Loss of Right to Commit Nuisance.*

729. The right to commit what but for express or implied grant would be a nuisance may be expressly relinquished, or lost by such conduct as will infer abandonment.[2] Non-user for a period far short of the prescriptive period, especially in cases where the legalisation of the nuisance depended on implied grant or prescription, may extinguish the right;[5] but in order to establish that result the facts must necessitate the inference that not a mere suspension but a real abandonment of the right had taken place.[6]

(iii) *Nuisance resulting from the Exercise or Non-exercise of Statutory Powers.*

730. Public bodies performing statutory duties or exercising statutory powers, where the burden of avoiding nuisance has not been laid upon them, are not liable (except where compensation is provided for by statute), in the absence of negligence, for injury arising as the natural result of the proper discharge of their duties.[7] To secure this immunity the means provided by the statute for the exercise of the power must be adopted,[8] or if such means are not specifically provided, those employed must be such as are necessary for the proper discharge of the duties.[9] Where a choice is possible and the duty may be performed so as to cause a nuisance, or so as to avoid causing one, the latter course must be followed.[1] If a public body discharges its statutory duties negligently and injury results, it will be liable in damages. "Where the legislature authorises the execution of works, it does not thereby exempt those authorised to make them from the obligation to use reasonable care that in making them no unnecessary damage be done." [2] Where the nuisance is not the direct result of the exercise of statutory powers, but is due to other causes within the control of the person exercising such powers, the burden of proving that the nuisance is a necessary result of the exercise of the powers rests on the user.[3] The question whether liability to individuals exists for the failure by a public body to discharge a public duty depends to a great extent on the language and scope of the particular statute.[4] Sanction given by magistrates under a local police Act does not warrant the party who obtains it to commit a nuisance, where its creation was not authorised by the Act.[5] For a succinct statement of the law in relation to nuisances resulting from the exercise of statutory powers and the duty imposed upon the undertakers, reference may be made to the case of *Manchester Corporation* v. *Farnworth.*[6]

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[1] Ersk. s. ii. 1, 2, Ivory's note; Rankine, Land-Ownership, 4th ed., pp. 397–400; *Mags. and Skinners of Inverness*, 1804, Mor. 13191; *Duke of Buccleuch* v. *Cowan*, 1866, 5 M. 214; 1876, 4 R. (H.L.) 14.

[2] Rankine, Land-Ownership, *loc. cit.*, and notes.

[3] *Ibid.*; *Rigby & Beardmore* v. *Downie*, 1872, 10 M. 568, 573.

[4] Per Lord Kinnear in *Midlothian County Council* v. *Pumpherston and Oakbank Oil Cos.*, 1903, 6 F. 387.

[5] *Rigby & Beardmore* v. *Downie*, *supra.*

[6] See per Chelmsford, Lord Chancellor, in *Crossley & Sons* v. *Lightowler*, 1867, L.R. 2 Ch. 478, 482.

[7] *Lord Blantyre* v. *Clyde Navigation Trs.*, 1871, 9 M. (H.L.) 6; *Boulter* v. *Crowther*, 1824, 2 B. & C. 703; *Hammersmith Rly. Co.* v. *Brand*, 1869, L.R. 4 H.L., per Lord Blackburn at p. 196; *Vaughan* v. *Taff Vale Rly. Co.*, 1860, 5 H. & N. 679, per Cockburn C.J.

Herron v. *Rathmines and Rathgar Improvement Commrs.*, [1892] A.C. 523, per Lord Macnaghten.

[8] *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbotts, Kensington*, 1885, 15 Q.B.D. 1.

(iv) *Coming to the Nuisance.*

731. It is no defence to an action of nuisance that the pursuer "came to the nuisance." The plea has reference to the situation where the complainer, with or without knowledge of the existence of the nuisance, acquires his right of ownership or of possession after its creation, and where his predecessor in title had not taken steps to have it abated, and had not lost his right to do so. Contrary to the view expressed by Professor Bell,[7] that it is a sufficient defence if the complainer comes to the nuisance, it is now settled law that the defence is bad. The maxim *volenti non fit injuria* has no application here. "It is clear," said Lord Halsbury, "that whether the man went to the nuisance or the nuisance came to the man, the rights are the same." [8] Opinions and *dicta* to the contrary, in earlier Scots cases [9] must now be held to have been overruled.

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[1] *Lord Advocate* v. *North British Rly. Co.*, 1894, 2 S.L.T. 71 ; *Ogston* v. *Aberdeen Tramways Co.*, 1896, 24 R. (H.L.) 8 ; [1897] A.C. 111 ; *Jordeson* v. *Sutton Gas Co.*, [1898] 2 Ch. 614.

[2] *Mersey Dock Trs.* v. *Gibbs*, 1864, L.R. 1 H.L., per Lord Blackburn at p. 112 ; *Steel* v. *Police Commrs. of Greenock*, 1872, 10 M. 954.

[3] *Ogston* v. *Aberdeen Tramways Co.*, [1897] A.C. 111 ; *Rapier* v. *London Tramways Co.*, [1893] 3 Ch. 598.

[4] *Atkinson* v. *Newcastle Waterworks Co.*, 1877, 2 Ex. D. 441, per Cairns L.C. ; *Cowley* v. *Newmarket Local Board*, [1892] A.C., per Lord Herschell at p. 352 ; Garrett, Law of Nuisances, 3rd ed., p. 230, and cases cited there.

[5] *Pentland* v. *Henderson*, 1855, 17 D. 542 ; *Kelt* v. *Lindsay*, 8th July 1814, F.C.

[6] [1930] A.C. 171.

[7] Prin., s. 978.

[8] *Fleming* v. *Hislop*, 1886, 13 R. (H.L.), at p. 49 ; the law of England is the same ; *Ibid.* ; *Bliss* v. *Hall*, 1838, 4 Bing. N.C. 183, per Tindal C.J.

[9] *Jameson* v. *Hilcoats*, 1800, Mor. App. Property, No. 4 ; *Duncan* v. *Earl of Moray*, 9th June 1809, F.C. ; *Colville* v. *Middleton*, 27th May 1817, F.C.

(v) *Public Benefit.*

732. Nor is it a relevant defence that the nuisance is beneficial to the public at large.[1] Private individuals have no legal duty to submit to unlawful burdens even if these are to the public advantage.

(vi) *Suitable Locus.*

733. It is not a good defence that the nuisance is being carried on in a suitable or convenient place,[2] and that no other place is available for the business. Here, however, the rule as to local standards of comfort [3] will be applied.

(vii) *Contribution by Complainer.*

734. The fact that the complainer contributes to the nuisance or is creating a similar nuisance is no defence.[4] If he creates a nuisance he is liable to be restrained at the instance of those whose rights are being infringed, whether the respondent or others. The remedy in that case is a counter action. If a nuisance is being caused by a number of persons each may be restrained from contributing to it, even if his individual share would not itself have been sufficient to cause the nuisance.[5] Nor is it, so long as the defender contributes to the nuisance,[6] a good answer that if the defender's operations were stopped the nuisance would still exist. That the defender will suffer great loss if his operations are stopped or interfered with is no defence.[7] Where it would be impossible for the defender to obey an interdict, the Court will not grant it;[1] but in such a case the defender will be liable for damages to the full extent of the infringement.[2]

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[1] *Arrott* v. *Whyte*, 1826, 4 Mur. 154, per Lord Gillies; *Duke of Buccleuch* v. *Cowan*, 1866, 5 M. 229, 237; *Fraser's Trs.* v. *Cran*, 1879, 6 R. 45, per Lord Justice-Clerk Moncreiff; *Attorney-General* v. *Leeds Corporation*, 1870, L.R. 5 Ch. 583.

[2] Per Lord Halsbury in *Fleming* v. *Hislop*, 1886, 13 R. (H.L.), at p. 49, referring to an old decision of Lord Chief Justice Hyde: "Unfortunately the term 'convenient' there was misunderstood in much later times to refer to convenience, which it was very difficult to distribute, because . . . the question was, conveniently to whom? But as used by the Lord Chief Justice it had a very intelligible meaning—it means, so convenient in the use that it should not be a nuisance to anybody; and in that sense, of course, the decision was right."

[3] *Charity* v. *Riddell*, 5th July 1808, F.C.; Mor. App. "Public Police," No. 6; *Dowie* v. *Oliphant*, Dec. 11th, 1813, F.C.; *Fraser's Trs.* v. *Cran*, 1877, 4 R. 795; *M'Ewen* v. *Steedman & M'Alister*, 1912 S.C. 156; *St. Helen's Smelting Co.* v. *Tipping*, 1865, 11 H.L.C. 642; *Polsue & Alfieri* v. *Rushmer*, [1906] 1 Ch. 234; [1907] A.C. 121.

[4] Rankine, Land-Ownership, 4th ed., p. 397; *Mackay* v. *Greenhill*, 1858, 20 D. 1251; *Barony Parochial Board* v. *Cadder Parochial Board*, 1883, 10 R. 510, 519; *Harvie* v. *Robertson*, 1903, 5 F. 338, 345; *St. Helen's Chemical Co.* v. *St. Helen's Corporation*, 1 Ex. D. 196; *Swindon Waterworks Co.* v. *Wilts Canal Co.*, L.R. 7 H.L. 697; *Lambton* v. *Mellish* [1894] 3 Ch. 163; *Sadler* v. *Great Western Rly. Co.*, [1896] A.C. 450.

[5] *Duke of Buccleuch* v. *Cowan and Ors.*, 1866, 5 M. 214, per Lord Justice-Clerk Inglis at p. 216, and Lord Cowan at p. 228.

[6] *Charity, supra*; *Duke of Buccleuch, supra*, per Lord Justice-Clerk Inglis; *Rigby & Beardmore* v. *Downie*, 1872, 10 M. 568, 573, per Lord Justice-Clerk Inglis; *Caledonian Rly. Co.* v. *Baird & Co.*, 1876, 3 R. 839, at pp. 843, 844, 846; *Crossley & Sons* v. *Lightowler*, 1867, L.R. 2 Ch. 478.

[7] *Montgomerie* v. *Buchanan's Trs.*, 1853, 15 D. 158; *Inglis* v. *Shotts Iron Co.*, 1881, 8 R. 1022; 1882, 9 R. (H.L.) 88, per Lord Blackburn.

(viii) *Use of Care and Skill—Accidental Nuisance.*

735. The existence of a nuisance establishes liability against him who causes or continues it, and it is no answer that the defender exercises the greatest care and skill in his operations.[3] The operations are only justifiable on the ground of acquired right, consent, or statute. If the invasion of the complainer's right was only accidental, or if there is no threat or likelihood of continuance, interdict will be refused, though the act may give rise to a claim of damages.

(ix) *Reasonable Use.*

736. To cause a nuisance is not a reasonable use of one's property, and hence such a plea will be repelled. Thus, it is no answer to a complaint to say that a stream is the natural clearance for sewage if by so using the stream nuisance results.[4]

SUBSECTION (4).—*Form of Remedy.*

737. Where nuisance actually exists an action of interdict and damages is the ordinary remedy. But if it is impossible to mitigate the nuisance, can interdict be granted? Obviously not, for breach of interdict involves the penalties of contempt of Court, and it would be unjust to impose that punishment where it is not possible for the defender to obtemper the order of the Court. In that case damages are the appropriate remedy. But the case may occur where, although the nuisance cannot be wholly removed, it may be abated, and where this can be done, as well as in the case where remedial works will effect a cure, the Court will order remedial measures, though the claim for damages will remain for past or for future injury. In order to entitle a complainer to interdict it is not necessary for him to shew that a nuisance exists and that damage has resulted. It is sufficient for him to establish that nuisance will be caused by the operations complained of.[5]

SUBSECTION (5).—*Remedial Works.*

738. Although interdict is the appropriate remedy against a threatened nuisance, it will not be granted unless it is practically certain that the nuisance will arise,[1] and unless the nuisance belongs to a known category. Interdict is also the appropriate remedy against the continuance of an existing nuisance. Yet to grant it in either case *de plano* might cause loss to a defender quite incommensurate with the benefit resulting to the complainer. It is therefore the practice of the Court, in many cases, before or even after granting *interim* interdict, to allow the respondent an opportunity of submitting proposals for the abatement or removal of the nuisance by means of remedial works; and to remit the scheme, when lodged, to a man of skill to report upon it,[2] or to allow experiments to be made with a view to melioration; [3] or the Court may itself order specific works to be carried out, *e.g.* the heightening of a chimney so as to obviate a nuisance.[4]

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[1] *Barony Parochial Board* v. *Cadder Parochial Board,* 1883, 10 R. 510, per Lord Justice-Clerk Moncreiff.

[2] *Chalmers* v. *Dixon,* 1876, 3 R. 461.

[3] *Rapier* v. *London Tramways Co.,* [1893] 2 Ch. p. 599, per Lindley L.J.; *Jones* v. *Festiniog Rly. Co.,* 1868, 3 Q.B. 733; *Powell* v. *Fall,* 1880, 5 Q.B.D. 597; *Slater* v. *A. & J. M'Lellan,* 1924 S.C. 854.

[4] *Montgomerie* v. *Buchanan's Trs.,* 1853, 15 D. 853; *Caledonian Rly. Co.* v. *Baird & Co.,* 1876, 3 R. 839.

[5] *Burntisland Whale Co.* v. *Trotter,* 1831, 5 W. & S. 649, per St. Leonards L.C.; *Arnot* v. *Brown,* 1852, 1 Macq. 229; *Alison* v. *Watt,* 1829, 7 S. 786.

739. The owner of premises against whom action is taken under the Public Health Act for the removal of a nuisance must first be given an opportunity of remedying it himself,[5] otherwise the expense of providing remedial works cannot be laid on the proprietor.[6] The Court may sist proceedings for interdict to allow remedial works set up by the respondent to be tested by a neutral party,[7] or may allow a respondent to lodge a minute stating how he proposes to obviate the nuisance.[8] Interim interdict may be granted notwithstanding that remedial works are in progress,[9] but may be refused according to circumstances.[10]

SUBSECTION (6).—*Abatement of Nuisance.*

740. Where a nuisance exists the question may arise as to whether the complainer may abate it (*i.e.* terminate it at his own hand). To do so would involve in some cases an act of trespass, in other cases no trespass at all. Another question that arises is whether notice of the intended removal or abatement of the nuisance by the complainer is necessary. The answers to these questions must depend on the character of the nuisance, and whether there is a case of emergency. Abatement by a private individual is not favoured by the law.[11] Where the abatement involves no trespass, as in the removal of boughs overhanging the complainer's own lands, notice is not necessary.[1] As owner *a centro usque ad cœlum* he is only exercising, in so doing, his right of exclusive possession. Where trespass is involved notice is necessary except in cases of emergency.[2] Cases of emergency justifying interference *brevi manu* without notice are, *e.g.* where a neighbour erects on his land a dam which interferes with the natural flow of a stream through the complainer's land, or kindles a fire which threatens the complainer's property; [3] and the right of interference without notice extends to disturbance of servitudes enjoyed by the complainer, such as rights of way [4] or a servitude of light. Interference without notice is particularly justifiable in cases of emergency where the neighbour did not cause the nuisance. Where no case of emergency exists notice of entry and abatement is necessary.[5] Where the nuisance was committed not by the present occupier, but by his predecessor in title, notice was required to be given.[6] But the complainer is liable if his entry and efforts at abatement cause unnecessary damage.[7]

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[1] *Steel* v. *Commrs. of Police of Gourock*, 1872, 10 M. 954; *France* v. *Cameron*, 1864, 3 M. 290.

[2] *Johnston* v. *Constable*, 1841, 3 D. 1263; *Fraser's Trs.* v. *Cran*, 1877, 4 R. 794; 5 R. 290; 6 R. 451; *Manson* v. *Forrest*, 1887, 14 R. 802; *Robertson* v. *Thomas*, 1887, 14 R. 822; *Countess of Seafield* v. *Kemp*, 1899, 1 F. 402.

[3] *Arnott* v. *Brown*, 1847, 9 D. 497; 10 D. 95; affd. 1 Stu. 694, 15 D. (H.L.) 10; 1 Macq. 229; *Johnston, supra.*

[4] *Laing* v. *Muirhead*, 1822, 2 S. 67.

[5] *Cadder Local Authority* v. *Lang*, 1879, 6 R. 1242.

[6] *United Kingdom Temperance Institution* v. *Parochial Board of Cadder*, 1877, 4 R. (J.), 39.

[7] *Countess of Seafield* v. *Kemp, supra*; *Dodds* v. *Hilson*, 1874, 1 R. 527.

[8] *Wilsons* v. *Brattiani*, 1877, 14 S.L.R. 667.

[9] *Countess of Seafield* v. *Kemp, supra*; *Duke of Buccleuch* v. *Cowan*, 1873, 1 R. 85.

[10] *Manson* v. *Forrest*, 1887, 14 R. 802.

[11] *Lagan Navigation Co.* v. *Lambeg Bleaching, etc., Co.*, [1927] A.C. 226.

SECTION 5.—CONVENTIONAL NUISANCES.

See BUILDING RESTRICTIONS.

SECTION 6.—PARTICULAR NUISANCES AT COMMON LAW.

741. Nuisances at common law are commonly classified as relating to (*a*) water, (*b*) support, (*c*) air, and (4) other interferences with the comfortable enjoyment of property. Infringements of natural rights of property in water and land are treated in the articles WATER AND WATER RIGHTS and SUPPORT. The subject of Water Pollution, however, may be conveniently treated under "Nuisance."

SUBSECTION (1).—*Pollution of Water.*

742. In dealing with this subject, regard must be had to whether the alleged nuisance exists in water dedicated to primary uses or to secondary uses. The former include ordinary domestic uses such as drinking, cooking, washing, watering cattle; the latter include manufacturing and other uses which do not require so great a degree of purity as water used for primary uses. Where the primary uses have been substantially enjoyed it is of no moment (in a question of prescription) that the stream has also been used to some extent for the purpose of conveying sewage; "and it is necessary for the upper heritor to shew that the primary uses have been destroyed before the upper heritor can have his prescriptive right to pollute the stream established."[1] The undernoted cases furnish some examples of destruction of fitness for primary purposes by discharge from *opera manufacta* [2] and by sewage pollution,[3] and also of destruction of fitness for secondary purposes.[4]

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[1] *Lemmon* v. *Webb*, [1895] A.C. 1.
[2] *Ibid.*, per Herschell L.C. at p. 5.
[3] Salmond on Torts, p. 222.
[4] *Macdonald* v. *Watson*, 1830, 8 S. 584.
[5] *Saxby* v. *Manchester and Sheffield Rly. Co.*, 1869, L.R. 4 C.P. 198.
[6] *Jones* v. *Williamson*, 1843, 11 M. & W. 176.
[7] *Roberts* v. *Rose*, 1865, 4 H. & C. 103.

743. "What will be held a nuisance," says Lord Cockburn,[5] "differs in different circumstances. In regard to rivers, there are different cases in which the results will be different. (1) The river may be a public river, or immemorially abandoned to public works. (2) It may be a private river, retained for the primary purposes to which water is applicable. These two cases are clear, as in the one scarcely anything would be a nuisance, and in the other there is scarcely anything which would not be a nuisance. (3) There is, however, an intermediate case . . . where the stream has been partly appropriated to manufacturing purposes, and is in part applicable to the primary uses. Such a case is regulated by this rule, that no person is entitled to destroy or materially impair its fitness for manufactures previously existing, either by establishing a new process, or by carrying on one already existing to a greater extent than formerly. But on the other hand, the party complaining of being injured is not entitled to increase his liability to injury by giving up precautions previously used, or by neglecting to give warning to the party injuring him."

(i) *Public Rivers.*

744. The Crown, being the proprietor of the channels of public or navigable rivers, the solum of bays and estuaries *intra fauces terræ*, and the bed of the sea within the three-mile limit, is entitled to prevent nuisances caused by pollution.[6] Where the Crown has granted to private persons patrimonial rights, *e.g.* of salmon-fishing in a public river or in the sea, these grantees are entitled to prevent injury to their rights by pollution.[7] The right to navigate does not warrant the infringement of riparian rights; and obstruction to navigation, whether by erections in or over the river or by excessive abstraction of water,[1] may be restrained.

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[1] *Mags. of Portobello* v. *Mags. of Edinburgh*, 1882, 10 R. 130, per Lord Justice-Clerk Moncreiff at p. 139.

[2] (Distillery) *Miller* v. *Stein*, 1791, Mor. 12523; Bell, Oct. Cas. 334; (Printing Calico Manufactory) *Miller* v. *Marshall*, 1828, 5 Mur. 28; (Turkey Red Dye Work) *Dunn* v. *Hamilton*, 1837, 15 S. 853; 1839, Macfarlane 241; (Paper Mill) *Duke of Buccleuch* v. *Cowan*, 1866, 5 M. 214; (Chemical Work) *Rigby & Beardmore* v. *Downie*, 1872, 10 M. 568; (Farina Manufactory) *Robertson* v. *Stewart's Trs.*, 1872, 11 M. 189; (Muddy Water from Buddles) *Hodgkinson* v. *Ermor*, 1863, 4 B. & S. 229; (Discharge from Reservoir) *Clowes* v. *Staffordshire Potteries Waterworks Co.*, 1872, L.R. 8 Ch. 125; (Coal Workings) *Bankier Distillery Co.* v. *Young's Collieries*, 1899, 2 F. 89.

[3] *Montgomerie* v. *Buchanan's Trs.*, 1853, 15 D. 853; *Caledonian Rly. Co.* v. *Baird & Co.*, 1876, 3 R. 839; *Kincaid Smith* v. *Cameron*, 1900, 2 F. 1179.

[4] (Discharge from Dyeworks hurting Tannery) *Ewen* v. *Turnbull's Tr.*, 1857, 19 D. 513, per Lord Justice-Clerk Hope at p. 516; (Discharge from Dyeworks hurting Carpet Manufactory) *Crossley & Son* v. *Lightowler*, 1866, L.R. 3 Eq. 279; 1867, L.R. 2 Ch. 478.

[5] *Collins* v. *Hamilton*, 1837, 15 S. 895.

[6] *Lord Advocate* v. *Clyde Navigation Trs.*, 1891, 19 R. 174.

[7] *Moncreiffe* v. *Perth Police Commrs.*, 1886, 13 R. 921; *Duke of Richmond* v. *Burgh of Lossiemouth*, 1904, 12 S.L.T. 166.

(ii) *Private Rivers.*

745. As regards these, the riparian proprietors, who are owners of the bed or *alveus*, have a common interest in the water of the stream,[2] and the right to prevent illegal pollution unfitting it for the purposes, primary or secondary, to which it has been dedicated. Every stream absorbs a certain amount of natural impurity in its flow, but such absorption entails no responsibility on riparian proprietors; but subject to that qualification, the proprietor who has the right to the primary uses is entitled to prevent pollution of the stream and to receive its flow uncontaminated by the introduction of any appreciable amount of polluting matter.[3] Strictly speaking, no person has without grant the right to pollute the water of a stream, but acquiescence in pollution [4] may bar a proprietor from objecting thereto.[5] Even when it is too late to object to an existing amount of pollution, an increase of impurities is a nuisance. Thus, where the pollution of a stream dedicated to manufacturing purposes was materially increased,[6] and where an increase in the discharge of sewage took place in consequence of the building of new houses in a district,[7] interdict was granted against the increase of the pollution caused thereby.

746. A riparian proprietor may not increase appreciably the temperature of the stream by the discharge into it of heated liquid if the result is injurious to his neighbour's rights.[8] Nor may a mineowner pump water from his mine into the stream to the injury of his neighbours, as where the effluent hardened the water and affected injuriously the working of a distillery which had a right to pure water.[9]

747. It is no answer to proceedings for pollution that others are contributing to the nuisance, for they too are liable to be sued except in so far as they have acquired right to pollute.[10]

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[1] *Attorney-General* v. *Great Eastern Rly. Co.*, 1871, L.R. 6 Ch. 572.

[2] *Morris* v. *Bicket*, 1864, 2 M. 1082, per Lord Neaves; 4 M. (H.L.) 44; *Miner* v. *Gilmour*, 1858, 12 Moore P.C. 156, per Lord Kingsdown.

[3] *Lyons* v. *Fishmongers Co.*, 1876, 1 App. Cas. 662; *North Shore Rly.* v. *Pion*, 1889, 14 App. Cas. 612; *Miller* v. *Marshall*, 1828, 5 Mur. 28; *Blantyre* v. *Dunn*, 1848, 10 D. 509; *Duke of Buccleuch* v. *Cowan*, 1864, 2 M. 876; 4 M. (H.L.) 14.

[4] *Rigby & Beardmore* v. *Downie*, 1872, 10 M. 568.

[5] See paras. 727, 728, *supra*.

[6] *M'Gavin* v. *M'Intyre Bros.*, 1890, 17 R. 818.

[7] *Caledonian Rly. Co.* v. *Baird & Co.*, 1876, 3 R. 839.

[8] *Tipping* v. *Eckersley*, 1855, 2 K. & J. 264.

[9] *Young* v. *Bankier Distillery Co.*, [1893] A.C. 691; see also *Montgomery* v. *Buchanan's Trs.*, 1853, 15 D. 853; *Caledonian Rly. Co.* v. *Baird & Co.*, *supra*; *Kincaid Smith* v. *Cameron*, 1900, 2 F. 1179, all cases of pollution by sewage.

[10] *Duke of Buccleuch* v. *Cowan*, 1864, 2 M. 653; 1866, 4 M. 475; 1866, 5 M. 214, 1054; 1873, 11 M. 675 (per Lord Justice-Clerk Inglis in his classic judgment); 1876, 4 R. (H.L.) 14.

748. Similar rules apply to mill lades,[1] canals,[2] dry ditches,[3] inland lochs,[4] percolating water and wells,[5] and reservoirs.[6]

(iii) *Injury to Salmon Fishings.*

749. Salmon fishings will be protected from pollution beyond established use and wont, and it is not necessary that the pollution or additional pollution should be proved to have reached the injured proprietor's own water, for the effect of pollution may be to injure the fishing interests in the whole river by destruction of spawn, or prevention of the running of fish.[7] The objection to pollution applies not only to private rivers, but also to public navigable rivers,[8] tidal waters,[8] and the sea.[9]

SUBSECTION (2)—*Pollution of the Air.*

750. The right of property in land extends *a cœlo usque ad centrum*, and hence an owner may lawfully build to any height, and so exclude or interfere with the lateral passage of air to his neighbour's land. But just as in the case of water, every landowner is entitled, in the absence of contrary right, to enjoy the atmosphere in reasonably pure and fit condition for the ordinary primary uses of life. "The analogy of the atmosphere may not be in all respects complete, inasmuch as the rights of riparian proprietors in water-runs are more capable of definition and appropriation than those in the purity of the atmosphere. But in the case of injury to health by polluting the air the regulating principles are precisely the same." [10]

751. Nuisance arises when a person pollutes the air by injecting into it smoke, noxious vapours, or gases, such as either injure health or property, are offensive to the senses, or productive of material discomfort to his neighbours in the reasonable enjoyment of their property.[11] As in all cases of nuisance, the tests applied must be the sensibility of normal, not of fastidious or super-sensitive people,[12] and regard must be had to conditions of locality and the habits of the residents.[13] Relief will be given by the Court much more readily if pollution or vibration causes damage to health or property, and not mere personal discomfort,[1] especially where the latter is only occasional.[2] Standards of comfort vary according to circumstances.[3]

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[1] *Eyre* v. *Earl of Moray*, 1827, 5 S. 912.

[2] *Caledonian Rly. Co.* v. *Baird & Co.*, 1876, 3 R. 839.

[3] *Scott* v. *Scott*, 1881, 8 R. 851, at p. 854.

[4] *Goldsmid* v. *Tunbridge Wells Improvement Commrs.*, 1865, L.R. 1 Eq. 161; 1866, L.R. 1 Ch. 349.

[5] *Ballard* v. *Tomlinson*, 1885, 29 Ch. D. 115.

[6] *Stockport Waterworks Co.* v. *Potter*, 1861, 7 H. & N. 160.

[7] *Countess of Seafield* v. *Kemp*, 1899, 1 F. 402.

[8] *Moncreiffe* v. *Perth Police Commrs.*, 1886, 13 R. 921.

[9] *Duke of Richmond* v. *Burgh of Lossiemouth* (O.H.), 1914, 12 S.L.T. 166.

[10] *Inglis* v. *Shotts Iron Co.*, 1881, 8 R. 1006, per Lord Justice-Clerk Moncreiff at p. 1021.

[11] *Fraser's Trs.* v. *Cran*, 1877, 4 R. 795; *Inglis*, *supra*, 9 R. (H.L.) 88, per Lord Blackburn; *Fleming* v. *Hislop*, 1886, 13 R. (H.L.) 43, at pp. 45 and 48.

[12] *Cooke* v. *Forbes*, L.R. 5 Eq. 166.

[13] See para. 710, *supra*.

752. The general principles already set forth as applicable to increase of nuisance, materiality, contribution, etc., apply to pollution of the air. Examples will be found in the cases undernoted.[4] Special statutory provisions have been enacted in regard to the emission of smoke,[5] but the common law is also applicable where the smoke is excessive.[6]

SUBSECTION (3).—*Noise or Vibration.*

753. Similar principles and standards are applicable to complaints regarding unusual noises and vibrations of the atmosphere.[7] Thus, to constitute nuisance, the noise must interfere with the reasonable comfort of the complainer,[8] in the ordinary use and enjoyment by him of his premises;[9] and a nuisance is committed if unusual vibration is habitually sent through a neighbour's wall to his material hurt or molestation. The fact that the district where the alleged nuisance arises is a locality where a considerable amount of noise and vibration is prevalent may make a complainer's case more difficult, but does not necessarily excuse the nuisance.[10] It is a question of circumstances. Material increase of existing noises constitutes nuisance whether the district is a noisy one or not.[11] Unnecessary noises during illness are penalised in any common stair, passage, or back court within burgh where a notice by a qualified medical practitioner of the existence of the illness has been posted.[1] The cases undernoted afford examples of nuisance caused by noise and vibration.[2]

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[1] Rankine on Land-Ownership, 399; *St. Helen's Smelting Co.* v. *Tipping*, 1865, 11 H.L.C. 642, per Lord Westbury; *Ralston* v. *Pettigrew*, 1768, Mor. 12808.

[2] *Dewar* v. *Fraser*, 1767, Mor. 12803.

[3] See para. 710 *et seq., supra.*

[4] (Burning Ricks) *Ralston* v. *Pettigrew*, 29th July 1768, F.C.; Mor. 12808; (Smoke from Furnaces and Steam Engines) *Cooper & Wood* v. *North British Rly. Co.*, 1863, 1 M. 499; 2 M. 116; (Glueworks) *Charity* v. *Riddell*, 5th July 1808, F.C.; Mor. App. "Public Police," No. 6; (Soda Manufactory) *Arrott* v. *White*, 1826, 4 Mor. 149; 1827, 5 S. 517; (Candle Manufactory) *Bliss* v. *Hall*, 1838, 4 Bing. N.C. 183; (Gas Manufactory) *Broadbent* v. *Imperial Gas Co.*, 1856, 7 De G. M. & G. 436; 26 L.J. Ch. 276; 1859, 7 H.L.C. 606; (Farina Manufactory) *Robertson* v. *Stewart's Trs.*, 1872, 11 M. 189; (Calcining Iron in Bings) *Inglis* v. *Shotts Iron Co.*, 1881, 8 R. 1006; 1882, 9 R. (H.L.) 78; (Calcining Mineral Refuse) *Fleming* v. *Hislop*, 1882, 10 R. 426; 1886, 13 R. (H.L.) 43; (Vapour from Creosote damaging Plants) *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14; (Copper Smelting) *St. Helen's Smelting Co.* v. *Tipping*, 1865, 11 H.L.C. 642; 35 L.J. Q.B. 66; L.R. 1 Ch. 66; (Slaughter House) *Palmer* v. *Macmillan*, 1794, Mor. 13188; *Swinton* v. *Pedie*, 1837, 15 S. 775; 1839, Macl. & R. 1018; *Pentland* v. *Henderson*, 1855, 17 D. 542; (Smell from Stables) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588; (Artificial Manure Manufactory) *Fraser's Trs.* v. *Cran*, 1877, 4 R. 794; 5 R. 290; 1879, 6 R. 451; (Deodorising Sewage) *Knight* v. *Gardner*, 1869, 19 L.T. (N.S.) 673; (Dung Depot) *Scott* v. *Leith Commrs. of Police*, 1830, 8 S. 845; 1835, 13 S. 646 (Uncovered Sewer) *Mackay* v. *Greenhill's Tr.*, 1858, 20 D. 1251; (Byre in Burgh) *Manson* v. *Forrest*, 1887, 14 R. 802; (Fumes from Chimneys) *Farmworth* v. *Manchester Corpn.*, [1929] 1 K.B. 533.

[5] See para. 762, *infra.*

[6] *Laing* v. *Muirhead*, 1822, 2 S. 73 (N.E. 67); *Cooper & Wood* v. *North British Rly. Co.*, 1863, 1 M. 499.

[7] *Crump* v. *Lambert*, 1867, L.R. 3 Eq. 409.

[8] *Gaunt* v. *Fynney*, 1872, L.R. 8 Ch. 8.

[9] *Brader* v. *Saillard*, 1876, 2 Ch. D. 701.

[10] *M'Ewen* v. *Steedman & M'Alister*, 1912 S.C. 156.

[11] *Polsue & Alfieri* v. *Rushmer*, [1907] A.C. 121.

SUBSECTION (4).—*Unnatural Heat.*

754. Another form of nuisance is the causing of excessive heat such as to interfere with the neighbour's reasonable enjoyment of his property for residence or business,[3] as from boiler flues, furnaces, etc.

SUBSECTION (5).—*Nuisances in respect of Highways.*

755. The use of a highway so as to interfere with the right of public user is a nuisance. The interference with traffic must be material, for a mere obstruction which does not appreciably impede the right of passage does not amount to nuisance.[4] To mix salt with snow on the street, thereby producing a freezing mixture harmful to horses engaged in traffic is a nuisance.[5] A private complainer must show special personal damage beyond what is being suffered by members of the public.[6] Thus where damage and inconvenience was caused to a frontager by offensive smoke from a load of cork which had caught fire from sparks emitted by a steam engine engaged in transporting the load, nuisance was committed;[1] and where a neighbour persistently unloaded his vans in front of the plaintiff's coffee shop so as materially to obstruct his light and access to the shop, and noisome stenches arose from dung, action was sustained.[2]

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[1] Burgh Police (Scotland) Act, 1903 (3 Edw. VII. c. 33), s. 53.

[2] (Printing Press in City) *Robertson* v. *Campbell and Villans*, 2nd March 1802, F.C.; Mor. App. "Public Police," No. 3; *Polsue & Alfieri* v. *Rushmer*, [1906] 1 Ch. 234; [1907] A.C. 121; *Johnston* v. *Constable*, 1841, 3 D. 1263; (Gas Engine in City) *M'Ewen* v. *Steedman & M'Alister*, 1912, S.C. 156; (Electric Light Generating Station) *Knight* v. *Isle of Wight Electric Light and Power Co.*, 1904, 73 L.J. Ch. 299; (Forges and Steam Hammers) *Kinloch* v. *Robertson*, 1756, Mor. 13163; *Roskell* v. *Whitworth*, 1871, 19 W.R. 804; *Goose* v. *Bedford*, 1873, 21 W.R. 449; (Boiler Making) *Baxter* v. *Bower*, 1875, 44 L.J. Ch. 625; (Circular Saw) *Viscountess Gort* v. *Clark*, 1868, 16 W.R. 569; (Noises from Dairy Business) held to cause nuisance in *Tinkler* v. *Aylesferry Dairy Co.*, 1888, 5 T.L.R. 52; held not to cause nuisance in *Fanshawe* v. *London and Provincial Dairy Co.*, 1888, 4 T.L.R. 694; (Noises from Hotel Kitchen) *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138; (Brass Band) *Walker* v. *Brewster*, 1867, L.R. 5 Eq. 25, per Wood L.C. at p. 30; (Circus Noises) *Inchbold* v. *Barrington*, 1869, L.R. 4 Ch. 388; (Showman's Organ) *Winter* v. *Baker*, 1887, 3 T.L.R. 569; (Organ in Refreshment Premises) *Lambton* v. *Mellish*, [1894] 3 Ch. 163; (Bell Ringing) *Soltau* v. *De Held*, 1851, 2 Sim. (N.S.) 133; 21 L.J. Ch. 153; (Vibration from Electric Light Machinery) *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 257; (Dancing Hall) *Jenkins* v. *Jackson*, 1888, 40 Ch. D. 71; (Fencing School) *Fleming* v. *Ure*, 1750, Mor. 13159; (Horses and Operations in Stables) *Ball* v. *Ray*, 1873, L.R. 8 Ch. 467; *Broder* v. *Saillard*, 1876, 2 Ch. D. 692; *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, per Kekewich J. at p. 591; (Hen Run) *Ireland* v. *Smith*, 1895, 33 S.L.R. 156; (Discharge of Gun) *Carington* v. *Taylor*, 1809, 11 East 571; *Keeble* v. *Hiskeringill*, 1809, 11 East 574; (Noise from Rifle Range) *Ferguson* v. *Pollok*, 1901, 3 F. 1140; (Rockets and Fireworks) *Walker* v. *Brewster*, *supra*; *Ibbotson* v. *Peat*, 1865, 34 L.J. Ex. 118; (Pigeon Shooting) *R.* v. *Moore*, 1832, 2 B. & Ad. 184; (Noise from Racecourse on Sunday) *Dewar* v. *City and Suburban Racecourse Co.*, [1899] 1 I.R. 345; (Shunting, etc., Motor Omnibuses) *Robinson* v. *London General Omnibus Co.*, 1910, 26 T.L.R. 233.

[3] *Robinson* v. *Kilvert*, 1889, 41 Ch. D. 88; *Wilsons* v. *Brydone*, 1877, 14 S.L.R. 667; *Rheinhardt* v. *Mentasti*, 1889, 42 Ch. D. 685, at p. 687.

[4] *R.* v. *Bartholomew*, [1908] 1 K.B. 555.

[5] *Ogston* v. *Aberdeen Tramways Co.*, 1896, 24 R. (H.L.) 8.

[6] *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138.

756. Inconvenience caused by building operations in connection with premises adjoining a street or highway must be submitted to, but only so far as the obstruction is reasonable in character and is not prolonged for an unreasonable time.[3] If user of a highway takes place in excess of the extent for which it is dedicated for public use, nuisance is committed. Thus, to use as a carriageway a path, over which a right of way exists for foot passengers only, is to commit a nuisance. Public bodies possessing parliamentary authority may break up public streets, but they must do so in the least obnoxious way, if the statute does not prescribe the precise manner in which the operations are to be conducted.[4]

757. The owner of business or residential premises contiguous to a highway is entitled to the reasonable use of the highway in front of his premises, and where vans and carts are stationed there for unreasonable periods he may have them removed.[5] Whether excessively heavy traffic causing damage to highways or city streets is illegal and a nuisance is a question of circumstances. Thus, the conveyance of heavy boilers over streets in an industrial district in Glasgow, in consequence of which granite setts were frequently crushed and had to be renewed, was proved not to have been unprecedented, but to have taken place for many years, and was not such as to infer negligence on the part of the defenders. The Courts decided that the defenders were not liable at common law for the cost of making good the damage. To have asserted an absolute right to use the streets for boiler traffic, regardless of limit of weight and its effect on the structure of the streets, would have been beyond their rights.[6]

758. The use of motor cars on the public highway may in certain circumstances be a nuisance. Nothing in the Motor Car Acts exempts these vehicles from the application of the common law of nuisance; and compliance with statutory requirements is no defence to an action of nuisance laid at common law;[7] but a car is not a nuisance merely because it is not in accordance with statutory requirements.[8] The Locomotive Act, 1861, provides:[9] "Nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use where, but for the passing of this Act, such indictment or action could be maintained." This enactment applies to motor cars.[1] Defective motor cars on the highway may be nuisances if they render the road dangerous or inconvenient to the public in their use of the road, as, for example, a car addicted to skidding without fault on the part of the driver,[2] or one with defective steering gear, which is a source of danger to the public,[3] or one which emits excessive noise or steam.[4]

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[1] *Slater* v. *A. & J. M'Lellan*, 1924 S.C. 854.

[2] *Benjamin* v. *Storr*, 1874, 30 L.T. 362; *Fritz* v. *Hobson*, 1880, 14 Ch. D. 542.

[3] *Harrison* v. *Southwark and Vauxhall Waterworks Co.*, [1891] 2 Ch., per Vaughan Williams L.J. at pp. 413, 414.

[4] See para. 730, *supra*.

[5] *Attorney-General* v. *Brighton and Hove Co-operative Supply Assoc.*, [1900] 1 Ch. 276; *Attorney-General* v. *Smith (W. H.) & Sons*, 1910, 74 J.P. 313.

[6] *Glasgow Corpn.* v. *Barclay, Curle & Co.*, 1923 S.C. (H.L.) 78, and cases cited.

[7] *Bantwick* v. *Rogers*, 1891, 7 T.L.R. 542; *Galer* v. *Rawson*, 1889, 6 T.L.R. 17.

[8] *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; affd. [1923] 2 K.B. 832.

[9] 24 & 25 Vict. c. 70, s. 13. See *Slater* v. *A. & J. M'Lellan*, *supra*.

SUBSECTION (6).—*Nuisances caused by Dangerous Proceedings.*

759. Many acts causing or likely to cause danger to the persons or damage to the property of the neighbours can be restrained as nuisances or as unnatural uses of property. Thus the building of a hospital for infectious diseases,[5] or the use of a rifle-range where it is a danger to passers-by,[6] or the erection of barbed-wire fences on public roads where likely to hurt the lawful users thereof,[7] or the blasting of rock near another man's property, or in proximity to a highway, may be nuisances. Similarly the discharge of electricity on one man's premises may damage the instruments (not being of an unusually sensitive kind) of his neighbour and may be restrained,[8] on the principle of *Rylands* v. *Fletcher*.[9]

760. If a person collects a crowd he is responsible for damage done by members of it to neighbouring property, if such damage was a consequence which he should have foreseen.[10]

SECTION 7.—STATUTORY PROVISIONS AGAINST NUISANCE.

SUBSECTION (1).—*Alkali Works Regulation Acts.*

761. The Alkali, etc., Works Regulation Act, 1906,[11] repeals the Acts of 1881, 1884, and 1892, and consolidates and amends the law on this subject. It provides that alkali works shall be carried on so as to ensure the condensation of any noxious gases,[12] and that the best practicable means shall be used for preventing the discharge of noxious and offensive gases in alkali works, sulphuric acid works, chemical manure works, gas liquor works, nitric acid works, sulphate of ammonia works, muriate of ammonia works, chlorine works, or works in which chlorine bleaching powder or bleaching liquor is used, etc.[1] Every work in which acid is produced or used must be carried on so that the acid does not come in contact with alkali waste, or the drainage therefrom, so as to cause a nuisance. If alkali waste is deposited or discharged, the best practicable means must be taken to prevent a nuisance.[2] Contravention of any of the above provisions entails a penalty. Local authorities, at the expense of the owners of works, must construct drains to carry off acid, where such is discharged.[3] The works above specified must be registered, and a certificate of registration must be obtained every year.[4] The Secretary for Scotland appoints inspectors and a chief inspector, who have power to enter and inspect the works dealt with in the Act.[5] A local authority, on a written representation of any of their officers, or of any ten inhabitants of their district, may complain to the Secretary for Scotland in regard to any works which contravene the Act or cause a nuisance. The Secretary for Scotland may direct proceedings to be taken.[6]

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[1] Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), Schedule.

[2] *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652.

[3] *Hutchins* v. *Maunder*, 1920, 37 T.L.R. 72, commented on in *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; affd. [1923] 2 K.B. 832.

[4] *Bantwick* v. *Rogers*, 1891, 7 T.L.R. 542; *Galer* v. *Rawson*, 1889, 6 T.L.R. 17.

[5] *Metropolitan Asylum District* v. *Hill*, 1881, 6 App. Cas. 193.

[6] *Ferguson* v. *Pollok*, 1901, 3 F. 1140.

[7] *Elgin County Road Trs.* v. *Innes*, 1888, 14 R. 48.

[8] *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186.

[9] 1866, L.R. 1 Ex. 265; 1868, L.R. 3 H.L. 330.

[10] *Scott's Trs.* v. *Moss*, 1889, 17 R. 32; *Barber* v. *Penley*, [1893] 2 Ch. 447; *Walker* v. *Brewster*, 1867, L.R. 5 Eq. 25.

[11] 6 Edw. VII. c. 14.

[12] Secs. 1, 6.

SUBSECTION (2).—*Smoke Nuisance Abatement Acts.*

762. The Smoke Nuisance Abatement (Scotland) Acts, 1857 and 1865,[7] the Public Health (Scotland) Act, 1897,[8] and the Burgh Police (Scotland) Act, 1892,[9] make provision for the abatement of nuisance arising from the smoke of furnaces in burghs. They apply to every burgh and town in Scotland having a population of not less than 2000. The common law of nuisance is also applicable to pollution of the atmosphere.[10] Under ss. 1 and 2 of the Act of 1857 "every furnace employed or to be employed in the working of engines by steam, whether locomotive or otherwise," in any place to which the Acts apply, or "on board of any steam vessel stopping at or in any such place, or in or at any port, pier, landing-place, or harbour within the same, or when plying on any part of a river which at such part shall not exceed a quarter of a mile in breadth, and every furnace employed or to be employed in any mill, factory, distillery, brewhouse, sugar-refinery, bakehouse, gasworks, waterworks (although a steam-engine be not employed therein), or in any public bath or washhouse within the same, although such public bath or washhouse shall not be used for the purposes of trade or manufacture," must in all cases be constructed or altered so as to consume or burn "as far as possible" the smoke arising from such furnace.

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[1] Secs. 2, 7, 8, and Schedule.

[2] Secs. 3, 4, 6.

[3] Sec. 3.

[4] Sec. 9.

[5] Secs. 10 *et seq.*

[6] Sec. 22.

[7] 20 & 21 Vict. c. 73; 28 & 29 Vict. c. 102.

[8] 60 & 61 Vict. c. 38.

[9] 55 & 56 Vict. c. 55.

[10] *Lang* v. *Muirhead*, 1822, 2 S. 73 (N.E. 67); *Cooper & Wood* v. *North British Rly. Co.*, 1863, 1 M. 499.

763. A chemical work has been held to be a factory within the meaning of these sections.[1] Where part of a river is more than a quarter of a mile broad, although within the limits of a burgh to which the Act applies, a smoke nuisance under this Act cannot be committed on board a vessel sailing thereon.[2] "As far as possible" means as far as possible consistently with carrying on in an ordinary manner the trade in which the furnace is employed, and with a careful use and management of a properly constructed furnace.[3] The owners of works are liable for the negligence of their stokers.[4]

764. Every person or company being (1) the owner or occupier of the premises, or (2) the owner of the locomotive engine in which such furnace is, or (3) the foreman or other person employed by such owner or occupier in connection with such furnace, or (4) the owner or master or other person in charge for the time being of any such steam vessel, who uses within any such place, or on board of any such steam vessel, any such furnace not so constructed, or so negligently uses any such furnace, that the smoke arising therefrom is not effectually consumed or burned, commits an offence against the Act of 1857 (s. 1). Any one of two or more joint owners or occupiers may be proceeded against (s. 11). The offender is liable on conviction to a penalty not exceeding £5 or less than forty shillings. On a second conviction the penalty is £10, and on each subsequent conviction the penalty is doubled (s. 1). Failure to pay the penalty within eight days may be followed by poinding and imprisonment for a period not exceeding fourteen days (s. 4).

765. Proceedings may be taken by the procurator-fiscal, the police commissioners, or the owner or occupier of the premises with reference to which the furnace is so situate as to create an annoyance to the occupiers of such premises.[5] The complaint must be brought by summary petition (1) before the Sheriff or Sheriff-Substitute, or (2) before a magistrate of the burgh or two justices of the peace, where the cost of the operations necessary to alter or amend the furnace will not exceed £25.[6] Where proceedings are begun before the Sheriff-Substitute and the cost of the operations will exceed £25, appeal is allowed to the Sheriff, and in similar circumstances appeal is allowed from him to the Lord Ordinary on the Bills, whose judgment is final.[7]

766. Sec. 384 of the Burgh Police (Scotland) Act, 1892, makes liable to a fine "every person who so uses, or causes, or permits, or suffers to be used any furnace or fire (except a household fire) as that smoke issues therefrom, unless he proves that he uses the best practical means for preventing smoke, and has carefully attended to and managed the said furnace or fire so as to prevent as far as possible the escape of smoke therefrom." Certain businesses are excepted from the operation of the clause.

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[1] *Ward & Co.* v. *Lang*, 1863, 1 M. 724.

[2] *Campbell* v. *Auld*, 1882, 10 R. (J.C.) 28.

[3] *Cooper* v. *Woolley*, 1867, L.R. 2 Ex. 88.

[4] *Armitage, Ltd.* v. *Nicholson*, 1913, 23 Cox. C.C. 416; 108 L.T. 993; cf. *Chisholm* v. *Doulton*, 1889, 22 Q.B.D. 738 distinguished.

[5] 1857 Act, ss. 3 and 14; 1861 Act, s. 1.

[6] 1857 Act, ss. 1, 4, and 6.

[7] *Ibid.*, s. 7.

767. By the Public Health (Scotland) Act, 1897,[1] the following things are, for the purposes of the Act, declared to be nuisances:—

> Any fireplace or furnace, situated within the limits of any burgh or special scavenging district which does not so far as practicable consume the smoke arising from the combustible matter used therein, for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever:
>
> Any chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance, or injurious or dangerous to health,

and are liable to be dealt with summarily under that Act.[2] A boiler furnace, not mechanically stoked, was held not to be a nuisance under the Public Health Act, 1897, where hand-stoking was proved to be best suited to the users' requirements and not to cause a nuisance at common law.[3] Under the corresponding provisions in the Public Health (Scotland) Act, 1867, it was laid down in an earlier case [4] that the terms of the subsection are not necessarily confined to the case of faulty construction of a furnace, but extend also to the case where a furnace from "a bad system of working" does not in fact consume its own smoke.

SUBSECTION (3).—*Rivers Pollution Prevention Acts.*

(i) *Scope of Acts.*

768. There are two statutes dealing with the prevention of pollution of rivers, passed respectively in 1876 [5] and 1893.[6] The principal Act was passed, as stated in the preamble, in order "to make further provision for the prevention of the pollution of rivers, and, in particular, to prevent the establishment of new sources of pollution." The "streams" which come under the scope of its provisions include "the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined" by the Secretary for Scotland, by order published in the Edinburgh *Gazette*, and "rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid" (ss. 20 and 21). A "watercourse mainly used as a sewer" means a watercourse which has been converted into a sewer, and of which the main and primary use is that of a sewer, although water may still run in it.[1]

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[1] 60 & 61 Vict. c. 38, s. 16 (9) and (10).

[2] See para. 774, *infra*.

[3] *Mags. of Leith* v. *James Bertram & Son, Ltd.*, 1915 S.C. 1133.

[4] *Local Authority of Dumfries* v. *Murphy*, 1884, 11 R. 694.

[5] 39 & 40 Vict. c. 75.

[6] 56 & 57 Vict. c. 31.

(ii) *Solid Refuse.*

769. An offence against the Act is committed by every person who by one act or repeated acts "puts or causes to be put or to fall, or knowingly permits to be put or to fall or to be carried into any stream, so as either singly or in combination with other similar acts of the same or any other person, to interfere with its due flow or to pollute its waters, the solid refuse of any manufactory, manufacturing process, or quarry, or any rubbish or cinders, or any other waste, or any putrid solid matter" (s. 2). The word "person" in this and the following sections includes "any body of persons, whether corporate or unincorporate." "Solid matter" does not include "particles of matter in suspension in water" (s. 20). Where vegetable matter brought down by a stream entered the reservoir of a cotton mill and settled at the bottom of the reservoir, and thereafter at the weekly flushing of the reservoir was borne into the stream in the proportion of 2·4 per cent. of solid matter in suspension to 97·6 per cent. of water, it was held that this was not solid matter in the sense of s. 20.[2]

(iii) *Sewage.*

770. An offence against the Act is committed by every person who "causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream, any solid or liquid sewage matter" (s. 3). A stream does not cease to be a stream in the sense of the Act merely by being covered in and practically converted into a sewer.[3] But if the channel along which the sewage flows was used or constructed for the conveyance of sewage at the date of the passing of the Act, then the person causing or knowingly permitting the flow does not commit an offence under the Act if he can show the Court that he is using "the best practicable and available means" to render the sewage matter harmless. A certificate granted by an inspector appointed for the purposes of the Act by the Secretary for Scotland, subject to appeal to the latter, and renewed every two years, is conclusive evidence, both in this case and those mentioned in the following sections, that the best or only practicable or available means are being used (s. 12). If a local authority were at the date of the passing of the Act discharging sewage into the stream through a wholly or partly constructed channel, the Secretary of State may postpone the operation of the Act, so far as regards their case, in order to enable them to adopt the best practicable and available means for rendering the sewage matter harmless

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[1] Per Lord Justice-Clerk Moncreiff in *Mags. of Portobello* v. *Mags. of Edinburgh*, 1882, 10 R. 130.

[2] *Ribble River Committee* v. *Halliwell*, [1899] 2 Q.B. 385.

[3] *Lanarkshire County Council* v. *Mags. of Airdrie*, 1907, 44 S.L.R. 915; 15 S.L.T. 311; affd. 1910, 47 S.L.R. 508; [1910] A.C. 286.

(s. 3). Where proceedings were taken against a local authority for committing an offence under s. 3 of the Act, it was held that it was not a good defence that they had not materially altered the nature of the sewers since the date of the Act, and had done nothing to increase the flow of sewage matter from these sewers into the stream.[1] Where a person, with the sanction of the local authority, passes sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of the local authority, he is not guilty of an offence in respect of the passage of such sewage matter: the local authority is alone liable (s. 3). Where the channel through which the sewage flows into a stream is vested in the local authority, the latter will be deemed knowingly to permit the sewage matter to fall, flow, or be carried into the stream (1893 Act, s. 1). A local authority who were in default in having made no provision for dealing with the sewage in their sewers, were held not to be entitled to succeed in proceedings taken by them under the Act against a person whose drains were connected with the local authority's sewers, and who was entitled so to connect them, although the local authority had not sanctioned their so doing, both parties being offenders under the Act.[2]

(iv) *Polluting Liquid from Factories.*

771. An offence against the Act is committed by every person who "causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process" (s. 4). The adjective polluting does not include "innocuous discoloration" (s. 20). But if the channel along which such liquid flows was used or constructed wholly or in part at the date of the passing of the Act, or is a new channel substituted therefor, and having its outfall at the same spot, then the person causing or permitting the flow does not commit an offence under the Act if he can show the Court that he is using "the best practicable and reasonably available means" to render the liquid harmless (s. 4). This plea is, however, not available to manufacturers whose works are constructed after the passing of the Act.[3] A local authority must give facilities to manufacturers within their district to carry liquid from their factories or manufacturing processes into the sewers under their control, but the local authority do not require to admit into such sewers liquid which would prejudicially affect the sewers or the sewage matter or liquid injurious from a sanitary point of view, and, further, a local authority do not require to give such facilities where their sewers are only sufficient for the requirements of their district (s. 7). "Sewers" include all works for the purification of the sewage, and where, although the pipes were capable of carrying liquids from factories, the purification works of a local authority were not sufficient to deal with such liquid in addition to the sewage within the district, the local authority were held to be entitled to decline to allow the admission of the liquid under s. 7.[1] The word "sewers" in the second proviso of s. 7 includes not merely the pipes, but the works for purification of the sewage. A manufacturer draining noxious or polluting liquid into a sewer which communicates with a stream may commit an offence under s. 4, even although he has obtained facilities under s. 7.[2] A plea of prescriptive right to pollute a stream is not a good defence to an action by a local authority enforcing the Act.[3]

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[1] *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority*, [1894] 2 Q.B. 842.

[2] *Kirkheaton District Local Board* v. *Ainley, Sons & Co.*, [1892] 2 Q.B. 274.

[3] *Midlothian County Council* v. *Pumpherston Oil Co.*, 1903, 6 F. 387.

(v) *Polluting Matter from Mines.*

772. An offence against the Act is committed by every person who "causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine," unless in the case of poisonous, noxious, or polluting matter he can shew the Court that he is using "the best practicable and reasonably available means" to render such matter harmless (s. 5).

(vi) *Title to Enforce Acts.*

773. Proceedings in respect of any offence under the Act may be taken by any person aggrieved by the commission of such offence, or by the local authority, except in the case of offences under ss. 4 and 5. Proceedings against offenders under these sections can only be taken by the local authority with the consent or at the direction of the Secretary for Scotland, who, in giving or withholding his consent, must have regard to the industrial interests and the circumstances and requirements of the locality. Before consenting to any proceedings by the local authority of any district which is the seat of any manufacturing industry, the Secretary for Scotland must satisfy himself that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures, are reasonably practicable and available, and that no material injury will be inflicted on the interests of such industry (s. 6). After the consent of the Secretary for Scotland has been obtained, the person against whom the proceedings are proposed to be taken may apply to the local authority in writing to be heard on the question whether notwithstanding such consent proceedings should be taken against him, and after hearing the person so applying by himself, his agents and witnesses, and after inquiry the local authority are to determine whether the proceedings should or should not be taken. In addition to the public health local authority, the county council, in terms of s. 55 of the Local Government Act, 1889,[1] can enforce the provisions of the Rivers Pollution Prevention Act within the bounds of their county; and on the application of the council of any county or burgh concerned, the Secretary for Scotland may by provisional order appoint a joint committee, representing all the counties and burghs through which or by which a river or part of a river flows, to enforce the provisions of the Act in like manner.

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[1] *Brook* v. *Meltham Urban District Council*, [1909] A.C. 438.

[2] *Butterworth* v. *West Riding of Yorkshire Rivers Board*, [1909] A.C. 45.

[3] *Midlothian County Council* v. *Pumpherston Oil Co.*, 1903, 6 F. 387; *Butterworth, supra.*

(vii) *Form of Proceedings.*

774. Before proceedings can be taken, written notice of intention to do so must be given to the offender, and two months must have expired from the date of such notice (s. 13). In proceedings for offences under ss. 4 and 5 this notice must not be given before the consent of the Secretary for Scotland has been received to proceedings being taken. Otherwise the pursuers would have no title to sue. And the notice must state that such consent has been received and that proceedings are to be taken at a fixed date.[2] Proceedings are brought before the Sheriff, who, if he thinks the offence made out, may by summary order require the person offending to abstain from committing the offence, and to perform such duties as are necessary to bring the offence to an end (ss. 10 and 21). The making of this order is discretionary on the part of the Sheriff,[3] but he is not justified in refusing to make the order where the discharge would appreciably pollute the stream, were it otherwise pure, merely because the pollution of the stream from other sources prevents the pollution from the discharge in question being appreciable.[4] Before pronouncing decree, the Sheriff may remit to a man of skill to report on the nature and cost of the necessary works, and also on the "best practicable and available means," in cases where the Act specifies such a restriction on the total cessation of the pollution (s. 10). An appeal from the Sheriff's decree is allowed to the Court of Session in the form of a special case (ss. 11 and 21). The appeal must not be in any other form,[5] but the provisions of the Sheriff Court Act, 1907, apply to such appeals, and an interlocutory judgment of the Sheriff cannot competently be appealed to the Court of Session without leave of the Sheriff.[6] If the offender is ordained to stop the pollution, and does not obey the decree, he is liable in a penalty of £50 *per diem* as long as he persists in disobeying; and if he does so for more than a month, or for more than such period less than a month as may be prescribed in the decree, the Court may order any person to carry the decree into effect at the expense of the offender (s. 10).

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[1] 52 & 53 Vict. c. 50.

[2] *Midlothian County Council* v. *Oakbank Oil Co.*, 1903, 5 F. 700; *Yorkshire* (*West Riding*) *Rivers Board* v. *Holmfirth Urban Sanitary Authority*, [1907] 1 K.B. 431.

[3] *Kirkheaton District Local Board* v. *Ainley, Sons & Co.*, [1892] 2 Q.B. 274.

[4] *Staffordshire County Council* v. *Seisdon Rural District Council*, 1907, 96 L.T. 328.

[5] *Lanarkshire County Council* v. *Mags. of Airdrie*, 1906, 8 F. 802.

[6] *Dumfries County Council* v. *Mags. of Langholm*, 1912, 2 S.L.T. 473.

SECTION 8.—NUISANCE UNDER PUBLIC HEALTH ACTS.

SUBSECTION (1).—*Definition.*

775. The Public Health (Scotland) Act, 1897,[1] consolidates the law of Scotland relating to public health. The nuisances struck at by it are enumerated in s. 16, as follows:—

"(1) Any premises, or part thereof, of such a construction or in such a state as to be a nuisance, or injurious or dangerous to health.

"(2) Any street, pool, ditch, gutter, watercourse, sink, cistern, water-closet, earth-closet, privy, urinal, cesspool, drain, dungpit, or ashpit, so foul or in such a state or so situated as to be a nuisance, or injurious, or dangerous to health.

"(3) Any well or water supply injurious or dangerous to health.

"(4) Any stable, byre, or other building in which any animal or animals are kept in such a manner or in such numbers as to be a nuisance, or injurious or dangerous to health.

"(5) Any accumulation or deposit, including any deposit of mineral refuse, which is a nuisance, or injurious or dangerous to health, or any deposit of offensive matter, refuse, or offal, or manure (other than farm-yard manure, or manure from byres or stables, or spent hops from breweries), within fifty yards of any public road wherever situated; or any offensive matter, refuse, or offal, or manure other than aforesaid contained in mineral trucks or wagons standing or being at any station or siding, or elsewhere on a railway, or in canal boats, so as to be a nuisance, or injurious or dangerous to health.

"(6) Any work, manufactory, trade, or business, injurious to the health of the neighbourhood, or so conducted as to be injurious or dangerous to health, or any collection of rags or bones injurious or dangerous to health.

"(7) Any house, or part of a house, so overcrowded as to be injurious or dangerous to the health of the inmates." A building used during the day for religious services and at night as a refuge for the destitute poor, but which contained no sleeping accommodation, has been held to be a house within the meaning of a section in above terms,[2] the temporary occupiers being equivalent to inmates.[3]

"(8) Any schoolhouse or any factory which is not a factory subject to the provisions of the Factory and Workshop Acts, 1878 to 1895, or any Act amending the same with respect to cleanliness, ventilation, or overcrowding, and

"(i) is not kept in a cleanly state, and free from effluvia arising from any drain, privy, water-closet, earth-closet, urinal, or other nuisance; or

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[1] 60 & 61 Vict. c. 38.

[2] *Reg.* v. *Mead*, 1895, 64 L.J. M.C. 169.

[3] *Reg.* v. *Slade*, 1896, 65 L.J. M.C. 108.

"(ii) is not ventilated in such a manner as to render harmless, so far as practicable, any gases, vapours, dust, or other impurities generated in the course of the work carried on therein, that are a nuisance, or injurious or dangerous to health; or

"(iii) is so overcrowded while work is carried on as to be injurious or dangerous to the health of those therein employed.

"(9) Any fireplace or furnace situated within the limits of any burgh or special scavenging district, which does not, so far as practicable, consume the smoke arising from the combustible matter used therein for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever." "So far as practicable" means so far as practicable consistently with the carrying on of the manufactory, etc., in an ordinary manner, and with the careful use and management of a properly constructed furnace.[1] For observations on the construction of the corresponding subsections of the Public Health Act, 1867, see the case undernoted.[2] A hand-stoked boiler furnace is not a nuisance within the meaning of this subsection.

"(10) Any chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance, or injurious, or dangerous to health; [3] and

"(11) Any churchyard, cemetery, or place of sepulture so situated or so crowded, or otherwise so conducted, as to be offensive, or injurious, or dangerous to health.

"Provided that (*a*) a penalty shall not be imposed as hereinafter provided on any person in respect of any accumulation or deposit necessary for the effectual carrying on of any business, trade, or manufacture if it be proved to the satisfaction of the Court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business, trade, or manufacture, and that the best available means have been taken for preventing injury or danger thereby to the public health; and (*b*) in considering whether any dwelling-house or part thereof which is also used as a factory, or whether any factory used also as a dwelling-house, is a nuisance by reason of overcrowding, the Court shall have regard to the circumstances of such other use."

SUBSECTION (2).—*Enforcement of Acts.*

776. The enforcement of the Public Health Acts lies upon (1) town councils; [4] (2) county councils, as reconstituted in terms of the Local Government (Scotland) Act, 1929,[5] which are substituted for district committees as the local authorities in counties. If the local authority neglect to take proceedings, the Local Government Board have the choice of three courses to remedy such neglect: (*a*) They may give written notice to the local authority of the matter in which such neglect exists, and if the local authority do not, within fourteen days, take steps to remove the nuisance, the Board may present a petition to the Sheriff to enforce the removal or remedy of the nuisance, if need be, at the expense of the local authority (s. 146). (*b*) The Board may, with the approval of the Lord Advocate, present a petition to either Division of the Court of Session, or, during vacation, to the Lord Ordinary on the Bills, to compel the local authority to do their duty (s. 147). This is the usual mode of procedure.[1] (*c*) The Board may direct the procurator-fiscal of the Sheriff Court, with the approval of the Lord Advocate, to take proceedings to compel the local authority to do their duty, or himself to remove the nuisance at the expense of the local authority (s. 148). If the local authority neglect to take proceedings for the removal of a nuisance, this neglect may be remedied not only by the Local Government Board, but also by ten ratepayers residing within the district (s. 3), or by the procurator-fiscal of the Sheriff Court of the county, in the manner first above mentioned as applicable to the Local Government Board (s. 146).

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[1] *Cooper* v. *Woolley*, 1867, L.R. 2 Ex. 88.

[2] *Local Authority of Dumfries* v. *Murphy*, 1884, 11 R. 694.

[3] *Mags. of Leith* v. *James Bertram & Son, Ltd.*, 1915 S.C. 1133; see para. 762, *supra*.

[4] Public Health Act, 1897, s. 12, as modified by the Town Councils (Scotland) Act, 1900, s. 8.

[5] 19 & 20 Geo. V. c. 25, ss. 2, 8, 11, 12, 13 (delegation to committees), 14 (schemes of administration), 25 and 26 (district councils), and Schedule 1. Under s. 1 the functions

SUBSECTION (3).—*Parties Liable.*

777. The author of the nuisance, defined (s. 3) as "the person through whose act or default the nuisance is caused, exists, or is continued, whether he be the owner or occupier, or both," is the person responsible. "The word 'owner' means the person for the time entitled to receive, or who would, if the same were let, be entitled to receive, the rents of the premises, and includes a trustee, factor, tutor, or curator, and in case of public or municipal property applies to the persons to whom the management thereof is entrusted." "The word 'occupier' means, in the case of a building or part of a building, the person in occupation or having the charge, management, or control thereof, either on his own account or as the agent of another person; and in the case of a ship means the master or other person in charge thereof" (s. 3). Whether the owner or occupier, or both, are liable will depend on the nature of the nuisance. Where it arises from any want or defect of a structural character, or where the premises are unoccupied, the owner is the proper person to be proceeded against (s. 20, subs. (3)); but if the nuisance arises solely from the act or default of the occupier, and is outwith the knowledge and beyond the control of the owner, the occupier

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of parish councils, including those relating to legal proceedings under the Public Health Acts, see Public Health Act, s. 146, are (with certain exceptions) transferred to county councils.

[1] *Board of Supervision* v. *Local Authority of Montrose*, 1872, 11 M. 170; *Board of Supervision* v. *Local Authority of Pittenweem*, 1874, 1 R. 1124; *Board of Supervision* v. *Local Authority of Galashiels*, 1874, 12 S.L.R. 111.

is responsible.[1] Where the occupier of the house had received a statutory notice, and proceeded to abate the nuisance, and it turned out, in the course of the work, that the nuisance arose from defect of structure, it was held that the occupier was entitled to recover from the owner the amount expended by him in abating the nuisance.[2] But where the occupier of the premises, on receiving a friendly warning, addressed to the owner by the local authority, to abate a nuisance, did not send on the notice to the owner, but proceeded to do the work himself, it was held that he was not entitled to recover the expense from the owner.[3]

Subsection (4).—*Removal of Nuisance by Local Authority.*

778. Where the person causing the nuisance cannot be found, and it is clear that the nuisance is not caused by the act and default or sufferance of either the occupier or the owner of the premises, the local authority may remove the nuisance, and do what is necessary to prevent the recurrence thereof (s. 20, subs. (3)). In regard to a similar provision in the Public Health (London) Act, 1891, it was held by the Queen's Bench Division [4] that the sanitary authority were in the above circumstances bound to abate the nuisance, but the authority of this decision has been shaken by opinions expressed by the Chancery Appeal Judges in *Attorney-General* v. *Tod Heatley*,[5] in which case it was held that the proprietor of a vacant piece of ground was bound to prevent a nuisance caused by members of the public breaking up the hoarding surrounding the ground, and throwing filth and refuse on to it.

Subsection (5).—*Discovery of Nuisance.*

(i) *Information of Nuisances.*

779. Information of any nuisance struck at by the Act may be given by any person to the local authority of the district in which the nuisance exists, and it is the duty of the local authority officers, and of constables and officers of police of county or burgh, to give such information (s. 19).

(ii) *Inspection and Power of Entry to Premises.*

780. With a view to ascertain whether any nuisance exists within their district, the local authority are bound to inspect their district periodically (s. 17). If the local authority or medical officer or sanitary inspector have reasonable grounds for believing that a nuisance exists in any premises, they may, in order to inspect the same, demand admission for themselves, the chief constable or superintendent of police, or any other person, at any hour between 9 a.m. and 6 p.m., or at any hour when the operations which are suspected to cause the nuisance are believed to be in progress or are usually carried on, and may cause such work to be done as may be necessary for the effectual examination of the premises, provided that if no nuisance is found to exist, the local authority must restore the premises at their own expense. If admission to the premises is refused, the local authority, medical officer, or sanitary inspector may apply to the Sheriff or any magistrate or justice of the peace having jurisdiction, stating on oath such belief. The Sheriff, magistrate, or justice may thereupon, after intimation to the owner, occupier, or person in charge of the premises, require, by order in writing, the occupier or person having custody of the premises to admit the local authority and others aforesaid. If the occupier or person in charge does not obey this order, he is liable to a penalty of £5, and the Sheriff, magistrate, or justice may grant warrant to the local authority or others aforesaid to enter the premises by force. If no occupier or person in charge can be discovered, or if no person is found on the premises to give or refuse admission, the local authority may enter without order or warrant, and forcibly if need be. If no nuisance is found to exist, the local authority must restore the premises at their own expense. The order of the judge for the admission of the local authority and others aforesaid continues in force till the nuisance has been removed, or the work for which the entry was necessary has been done (s. 18). When the fact that a nuisance exists can only be ascertained by inspection, the local authority are not entitled to prosecute for the removal until they have made themselves fully acquainted by such inspection with the cause of the nuisance.[1]

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[1] *Home* v. *Local Authority of Kelso*, 1876, 3 Coup. 239.

[2] Per Charles J. in *Gebhardt* v. *Saunders*, [1892] 2 Q.B. 452.

[3] *Thompson & Norris Manufacturing Co., Ltd.*, 1895, 73 L.T. 369.

[4] *Conservators of River Thames* v. *Port Sanitary Authority of Port of London*, [1894] 1 Q.B. 647.

[5] [1897] 1 Ch. 560.

(iii) *Notice to Remove Nuisance.*

781. If the local authority are satisfied of the existence of a nuisance, they must immediately bring it to the knowledge of the person liable to remove it, by serving a notice on the author of the nuisance, or, if such author cannot be found, on the owner or occupier of the premises in which the nuisance exists, requiring him to remove it within a specified time, and to execute such works and do such things as are necessary for its removal (s. 20, subs. (1)). Where the nuisance arises from any want or defect, of a structural character, or where the premises are unoccupied, the notice should be served on the owner (s. 20, subs. (3)). If the local authority think it desirable, they may specify the works to be executed (s. 20, subs. (1)). They may also in the notice require such person to do what is necessary to prevent the recurrence of the nuisance, and, if they think fit, may specify the works to be executed for that purpose. They may also serve the notice even although the nuisance is for the time stopped if they think it is likely to recur (s. 20 (2)).

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[1] *Local Authority of Dumfries* v. *Murphy*, 1884, 11 R. 694, per Lord Pres. Inglis at p. 700.

SUBSECTION (6).—*Application for Removal.*

782. If the nuisance is not removed within the time specified in the notice, or if it is removed, but the local authority are of opinion that it is likely to recur or be repeated, they may apply for its removal by summary petition, referring to the clauses of the Act on which it is founded (ss. 21, 22, and 154). The application, in the case of nuisances under s. 16 (6) and (8), can only be made on a medical certificate, or on a representation by a parish council, or on a written requisition by ten ratepayers of the district (s. 22). Such petition may be presented to the Sheriff or to any magistrate or justice, except in the case of nuisance under s. 16 (6), (8), (9), (10), and (11), for the removal of which application must be made to the Sheriff only (s. 22). On the petition being presented, the judge orders it to be served on the author of the nuisance, and appoints written answers to be lodged within three days, or orders parties to attend in person (s. 154). If a churchyard is the nuisance in question, intimation is made to the collector of churchyard or other dues, or to such other person as the Sheriff thinks proper, who is allowed to appear and answer, if the Sheriff sees fit, as if he were the author of the nuisance (s. 22). Petitions and orders are served by (1) delivering them to or at the residence of the author of the nuisance, or if there is no person on the premises, by affixing them to some conspicuous part, or (2) putting them in the post office, duly addressed to the author of the nuisance, the date of the posting being the date of service (s. 159).[1] The petition and answers, if such are ordered, are the only written pleadings in the cause (s. 155).

783. On advising the written answers, if such are ordered, or on hearing parties, or in the event of the author of the nuisance failing to appear, the Sheriff (1) may at once give judgment, or (2) may remit the matter to a competent person to report upon, and may decern in terms of the report, or (3) may at the request of either party appoint a proof to be taken before himself on specified points within five days thereafter (s. 154). Where a proof is allowed, the judge has power to cite witnesses in common form. In cases dealing with nuisances under s. 16 (9), (10), and (11), the Sheriff must keep notes of the evidence, as in the civil proofs (s. 155). Within three days after the close of the proof, judgment must be pronounced.

784. If the Sheriff is of opinion that a nuisance is made out, he does not require to restrict his decree to the remedy asked for in the prayer of the petition; he may ordain the author of the nuisance to do whatever is necessary to remove the nuisance, specifying in what manner and within what time such removal is to be performed. If the judge is of opinion that the nuisance is likely to recur, he may grant interdict against the recurrence (s. 23). If it appears to him that the nuisance arose from the wilful fault or culpable negligence either of the owner or the occupier of the premises, and that a notice in respect thereof had previously been served on such author, he may, in addition to making decree as aforesaid, impose a fine not exceeding £5 on such owner or occupier (s. 22). If the nuisance be such as to render a building unfit for human habitation or use, he may prohibit such habitation or use until he has pronounced a judgment declaring the building habitable, from which date the building may be let or occupied (s. 23). If it appears to the judge that structural works require to be executed in order to remove or remedy the nuisance, he may order these works to be carried out under the direction and approval of some person appointed by him, and, if he thinks fit, he may require the local authority to furnish him with an estimate of the cost (s. 25). He may also find either party liable in expenses, in full or modified (s. 154).

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[1] *M'Dougall* v. *Duke of Argyll*, 1864, 3 M. 248.

SUBSECTION (7).—*Appeal.*

785. The decree of the judge trying the cause is final, and no appeal is competent therefrom in any application for the removal of a nuisance (s. 157), with the following exception: Where the application is one for removal of a nuisance under s. 16 (9), (10), and (11), and the Sheriff is of opinion that "the true value of the subject complained of as a nuisance, or the cost of the operations necessary to remove or amend it as ordered, or the value of the trade or business interfered with," exceeds £25 or £50 respectively, he certifies his opinion to that effect in his decree. If the value certified is above £25 but below £50, where the decree has been pronounced by the Sheriff-Substitute, either party is entitled to appeal to the Sheriff by lodging a note of appeal within three days after the date of the decree and serving this note on the opposite party or his agent; the note operates as a sist of execution until the appeal is heard and determined by the Sheriff, whose decision is final. If the value certified is above £50, (1) where the decree has been pronounced by the Sheriff-Substitute and has been brought by appeal under review of the Sheriff, the judgment of the latter on such appeal, or, (2) where there has been no such appeal, the original judgment of the Sheriff-Substitute, or (3) where the case has been heard originally by the Sheriff, his judgment may be appealed against to the Lord Ordinary on the Bills. This is done by lodging a note of appeal in the Bill Chamber, and serving a copy on the opposite party, or his agent, within eight days after the decree complained of, and also lodging with the note of appeal "a sufficient bond of caution by one or more obligants to the amount of £50 sterling, for payment or performance of any judgment that may be pronounced under his appeal." The note operates as a sist of execution till judgment is pronounced by the Lord Ordinary. The judgment of the Lord Ordinary is final, unless he allows a reclaiming note to the Inner House; if he does, the judgment of the Inner House is final (s. 156).

SUBSECTION (8).—*Penalties for Contravening Decrees.*

786. In the case of nuisances under s. 16 (1), (2), (3), (4), (5), (7), (10), and (11), if the decree to remove or remedy them is not complied with in good and sufficient manner and within the specified time, the author of the nuisance is liable to a penalty of not more than ten shillings per day during his failure to comply; and if a decree interdicting the recurrence of such nuisances has been pronounced and is knowingly infringed by act or authority of the owner or occupier, such owner or occupier is liable to a penalty not exceeding £1 per day during the infringement of the interdict. In the case of nuisances under subsections (6), (8), and (9), if the decree to remove or remedy is not complied with, the author of the nuisance is liable for the first offence to a penalty not exceeding £5, and for the second offence to a penalty not exceeding £10; for each subsequent offence, to a penalty not exceeding double the amount of the penalty last inflicted; but no penalty is to exceed £200. In the case of a nuisance under subsection (9), where the Sheriff has pronounced decree ordaining measures to be taken to make a fireplace or furnace consume its own smoke as far as practicable, and where a complaint that this decree has been contravened is presented, if it appears to the Sheriff that the best means available for mitigating the nuisance have not been adopted, he may suspend his final determination on condition that the author of the nuisance undertakes to carry into effect within a reasonable time the means which he judges to be practicable to prevent the nuisance (s. 24). Proceedings for the recovery of the above penalties must be taken by summary complaint in terms of the Summary Jurisdiction (Scotland) Act, 1908,[1] and the forms of procedure prescribed therein. Appeal against the decision of an inferior judge is competent on points of law to the Court of Justiciary (s. 60). Proceedings for the removal of a nuisance, and proceedings for the recovery of a penalty imposed on a person not obeying the decree of the Sheriff, are quite distinct processes, and should not be united.

SUBSECTION (9).—*Procedure on Non-Compliance.*

787. In case of non-compliance with or infringement of the decree of the judge ordering the removal or remedy of the nuisance or interdicting its recurrence, the judge may, on the application of the local authority, grant warrant to such person or persons as he deems right to do whatever is necessary to execute his decree, and if it appears to his satisfaction that the author of the nuisance is not known or cannot be found, he may ordain the local authority to execute whatever works are necessary to remedy the nuisance at the expense of the author of the nuisance, failing him the owner of the premises (s. 26). In every case an opportunity of executing the decree to abate the nuisance must be afforded to the author of the nuisance or the owner of the premises before warrant is granted to the local authority or others to execute it at his expense, and if no such opportunity is afforded him he is not liable for the cost which the local authority has incurred in obeying the warrant.[1] When the author of a nuisance, caused by accumulation of manure, etc., does not comply with a decree ordering its removal, and the Sheriff orders the local authority to remove it, the local authority may sell the manure, etc., by public roup after five days' notice by printed bills posted in the locality. If the manure, etc., is of less value than £2, or if delay would be prejudicial to health, the Sheriff may order in writing its immediate sale or destruction. The proceeds of the sale are applied in payment of the expenses incurred by the local authority; if there is a balance over after such payment it must be paid on demand to the owner of the article sold, but if there is a deficit, it must be paid by the author of the nuisance or the owner of the premises (s. 27).

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[1] 8 Edw. VII. c. 65.

Subsection (10).—*Procedure where Nuisance beyond District.*

788. Where a nuisance situated outside the district of a local authority causes offence or injury to people within such district, the local authority may call on the local authority of the district within which the nuisance is situated to take steps for its removal, and the latter are bound to do so, and to reimburse the former for any expense incurred by them thereby, the amount of such reimbursement, if disputed, being decided by the Local Government Board (s. 149).

Subsection (11).—*County Council By-laws for Prevention and Suppression of Nuisance.*

789. Under the Local Government (Scotland) Act, 1889,[2] the county council may from time to time make such by-laws as to them seem meet, *inter alia*, "for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county, and may thereby appoint such penalties, not exceeding in any case £5, as they deem necessary for the punishment of offences against the same." These by-laws cannot be made unless two-thirds of the council are present, and they must be properly advertised and receive the approval of the Secretary for Scotland as provided by the Act. They have no force or effect in any burgh unless they have been made with the consent of the town council. A by-law made by a county council under this section, which provided that "every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint or in any other way, or who without authority affixes or causes to be affixed to any church, chapel, or school-house, or without the consent of the owner and occupier, to any other building or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice," should be liable in a penalty not exceeding forty shillings, was held to be *ultra vires* of the county council under this section.[1] Another by-law provided that "no flesh or offal shall be applied to land as a top-dressing." Top-dressing was defined as "the application of flesh, blood, and offal, which have not been mixed with other material or treated in such a way as to prevent the exhalation of noxious smells therefrom, to land as fertilising agents by merely applying those to the surface of the ground without afterwards ploughing or digging them into the ground." The by-law was held [2] to be *ultra vires*, as too absolute in its terms, and amounting to an unreasonable restriction on agriculture, and, if read along with the definition of top-dressing, too vague for enforcement.[3]

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[1] *United Kingdom Temperance, etc., Institution* v. *Parochial Board of Cadder*, 1877, 4 R. (J.C.) 39; *Local Authority of Cadder* v. *Lang*, 1879, 6 R. 1242.

[2] 52 & 53 Vict. c. 50, s. 57.

SUBSECTION (12).—*Burgh By-laws for Prevention of Nuisance.*

790. The Burgh Police (Scotland) Act, 1892, s. 316, empowers town councils [4] to make by-laws for the prevention of nuisances. These by-laws have to be confirmed by the Sheriff and the Secretary for Scotland. The opinion was expressed that the duty of a town council to clean the drains is a statutory duty only, not a common law duty.[5] A by-law which provided that "no person shall convey material of any description along the streets or courts in the burgh in carts or carriages so loaded that any part of the load fall on any street or court within the burgh" was held not to be *ultra vires* or unreasonable. It was further held that the complaint charging a contravention of the by-law did not require to state that annoyance was caused to anyone, as the act complained of was *prima facie* a nuisance.[6]

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[1] *Eastburn* v. *Wood*, 1892, 3 White 300.

[2] Per Lord Justice-Clerk Macdonald and Lord Trayner, diss. Lord Moncreiff.

[3] *Dunsmore* v. *Lindsay*, 1903, 6 F. (J.) 14.

[4] Town Councils (Scotland) Act, 1900, ss. 5, 7, 8.

[5] *Brash* v. *Mags. of Peebles*, 1926 S.C. 995, per Lord Justice-Clerk (Alness).

[6] *Ronaldson* v. *Williamson*, 1911 S.C. (J.) 102 ; 6 Adam 519.

NULLITY OF MARRIAGE.

See MARRIAGE.

NURSES.

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SECTION 1.—INTRODUCTORY.

791. At common law the only topics which require special notice are the liability of nurses themselves for negligence and the responsibility of other persons and institutions who employ them or under whose auspices they work. Provision is now made by statute for the registration of nurses who have undergone certain training and obtained certain qualifications.

SECTION 2.—NURSE'S LIABILITY FOR NEGLIGENCE.

SUBSECTION (1).—*Grounds of Liability.*

792. A nurse professes a special skill and knowledge, and is liable for any injury caused by her failure to exhibit these. It is implicit in the decided cases that the skill and knowledge have two aspects. First, a nurse must be able to carry out the directions of the doctor in charge of the case, *e.g.* to apply a fomentation or do a simple dressing. The patient and the doctor are entitled to expect that she can perform these duties, and if through her failure the patient is injured she will be liable, but the doctor will not be liable.[1] If the patient is injured owing to the nurse carrying out the negligent directions of the doctor, is she liable, or is it a good defence for her to shew that she was merely carrying out instructions? Generally speaking it is no answer to a claim based on negligence for the defender to plead a relationship to which the injured person is not a consenting party.[2] But it might be held that the patient was a consenting party to the relationship of doctor and nurse and was bound by the usual incidents of that relationship. The undernoted cases[3] support the view that, if a nurse applies a harmful ointment or plaster which has been negligently prescribed by the doctor, the doctor is liable for any injury caused. But there is no case where the nurse's liability is discussed. Possibly that question is one of degree, and if the mistake is one which the nurse ought to notice, she would be in fault if she did not point it out to the doctor.

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[1] See para. 796, *infra*.

[2] Beven on Negligence, 4th ed., i. 848.

[3] *R.* v. *Long*, 1830, 4 C. & P. 398, at p. 409; *R.* v. *Spiller*, 1832, 5 C. & P. 333.

793. Secondly, apart from the doctor altogether, a nurse must be able to act on her own initiative to some extent. For example, she must know what temperature an unconscious patient can stand when she applies a hot-water bottle,[1] and she must probably have sufficient elementary medical knowledge to realise when the state of the patient is such that the doctor should be sent for.[2]

SUBSECTION (2).—*To Whom is the Liability?*

794. In a question with the nurse alone the ground of action in a claim of damages for unskilful or careless treatment is breach of her duty to her patient and not breach of contract with the person who engages her. The title to sue is therefore in the patient, not in the nurse's employer.[3] Where, however, a question arises as to the liability of a hospital or other institution for injuries caused by a nurse, the matter is more complicated. If the action is based on the vicarious liability of the institution for the fault of the nurse as their servant, the title to sue will be in the patient. But if it is based on the failure of the institution to supply a competent nurse, it must be in the person making the contract.[4] Such person might, however, be regarded, at least in some cases, as the agent of the patient to make the contract.

SECTION 3.—LIABILITY OF HOSPITALS, ETC.

SUBSECTION (1).—*General.*

795. There are two distinct grounds upon which a hospital or nursing association or other body or an individual supplying a nurse may be liable for injuries caused by her. The first is based on contract. Where A supplies a nurse for B he impliedly undertakes that he has used due care to select a competent nurse.[5] If he fails in this undertaking, B has a direct action for breach of contract for any injury he may suffer. The second is based on the liability of a master for his servant's negligence, but this principle has a restricted operation in the case of nurses. An employer, provided he has used due care to select a competent nurse, is liable for injuries due to the negligence of a nurse in his employment only if that negligence occurs in a sphere in which the employer can or does exercise control.[1]

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[1] Cf. *Hall* v. *Lees*, [1904] 2 K.B. 602.

[2] In *Hillyer* v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, Kennedy L.J., at p. 829, gives this as an illustration of an administrative duty for a nurse's failure in which the Governors of a hospital might be responsible. The ground of liability is not the right and power of the Governors to control the nurse in this duty, but is the duty to select and employ competent servants.

[3] *Edgar* v. *Lamont*, 1914 S.C. 277.

[4] See para. 797.

[5] *Lavelle* v. *Glasgow Royal Infirmary*, 1930 S.C. 123, per Lord Ormidale at p. 126, Lord Hunter at p. 128; *Hall* v. *Lees*, [1904] 2 K.B. 602, per Collins M.R. at p. 610; *Hillyer* v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, per Farwell L.J. at p. 826.

SUBSECTION (2).—*Doctors.*

796. The doctor and the nurse each has his or her own duties, and the doctor has no liability for injury due to the negligence of the nurse in her own sphere. Accordingly, if by the nurse's fault a patient is burned by a hot-water bottle at an operation, the doctor is not liable, because that is a matter wholly within the nurse's sphere.[2] Again, if the doctor orders a hot bath, and the nurse scalds the patient, there is no liability on the doctor, if he is not present, it being no part of his ordinary duty to direct and superintend.[3] A doctor is not liable for a nurse's negligence merely on the ground that he selected her,[4] but, if he undertakes to select, he probably has a duty to use reasonable care to select a competent nurse.

SUBSECTION (3).—*Nurse's Employer.*

797. If the nurse is engaged, not by the patient, but by a third party, *e.g.* by a mistress for a domestic servant, the result may be that the person engaging the nurse is liable for injury due to her negligence. The question is whether the contract is one of service or for services, and the answer depends on the particular circumstances.[5] The degree of control exercised by the employer, the nature of the case, and the circumstances of the household are, or may be, relevant considerations.[6] If the nurse acts under the direction of her employer, the contract is one of service,[7] and the employer is liable for her negligence. If she takes responsible charge of the case, under the doctor, the contract is one for services, and the employer has no responsibility.

SUBSECTION (4).—*Hospitals.*

798. Hospitals are bound to use reasonable care to select competent nurses,[8] but there is no reported case of an action against a hospital based on breach of this duty. In actions based on their vicarious liability for the negligence of their nurses they have hitherto succeeded in evading legal liability on one or both of two principles. The first is that a distinction exists between what are called the professional and the administrative duties of a nurse, and that the hospital is not liable for injury due to a nurse's failure in her professional duties, though it is probably liable for her failure in administrative duties.[1] The theory underlying this distinction is that the managers of a hospital can control a nurse in her administrative duties, where they have not the necessary skill and knowledge to control her in her professional duties. The second principle is that, where a nurse is acting under the instructions of a doctor in treatment or of a surgeon at an operation, she is *pro hac vice* under the control of the doctor,[2] though this does not necessarily render the doctor liable for the results of her negligence.[3]

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[1] *Lavelle* v. *Glasgow Royal Infirmary*, 1930 S.C. 123, per Lord Ormidale at p. 127; *Hillyer* v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, per Kennedy L.J. at p. 829: cf. *Dow* v. *M'Neill*, 1925 S.C. 50, per Lord Pres. Clyde at p. 56, Lord Cullen at p. 58.

[2] *Beckh* v. *Sinclair*, the *Times*, 3rd November 1927. In this case it was apparently admitted that the nurse was not the servant or agent of the doctor, and, in view of that admission, it is difficult to see what other result could have been reached on the point of vicarious liability. It was also held that there is no direct duty on an operating surgeon to satisfy himself that the patient is not likely to be burned by a hot-water bottle.

[3] *Perionowsky* v. *Freeman*, 1866, 4 F. & F. 977.

[4] *Hall* v. *Lees*, [1904] 2 K.B. 602, per Matthew L.J. at p. 617.

[5] *Dow* v. *M'Neill*, 1925 S.C. 50.

[6] *Ibid.*, per Lord Pres. Clyde at p. 56.

[7] *Ibid.*, Lord Skerrington at p. 57, Lord Cullen at p. 58.

[8] See para. 795, note 5.

SUBSECTION (5).—*Nursing Associations.*

799. The question here is whether the association undertook to nurse the patient or merely to supply a nurse. In the first case it is liable for the results of the nurse's negligence; in the second it is not liable, provided it uses due care to select competent nurses.[4]

SUBSECTION (6).—*Nursing Homes.*

800. The proprietors of a nursing home, if themselves trained nurses, would probably be liable for injury due to the negligence of their own nurses. Usually they undertake to nurse, not merely to supply a nurse, and they can and do control the manner in which the nurses carry out their professional duties. If, however, the proprietors are not trained nurses, and a case of negligence in a professional duty arises, a conflict of principle will occur. In the nursing association case [5] they are liable because they undertake to nurse. In the hospital cases [6] they are not liable because, through lack of skill and knowledge, they cannot control the nurse in her professional duties.

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[1] *Lavelle* v. *Glasgow Royal Infirmary*, 1930 S.C. 123, per Lord Ormidale at p. 127, Lord Anderson at p. 129; *Hillyer* v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, per Kennedy L.J. at p. 829. It is noticeable that in Lavelle the substance of the charge against the nurse was that she had through forgetfulness omitted to carry out a general rule of the department, and that no particular professional skill was required.

[2] *Lavelle* v. *Glasgow Royal Infirmary, supra*, Lord Ormidale at p. 127, Lord Anderson at p. 130; *Hillyer* v. *Governors of St Bartholomew's Hospital, supra*, per Farwell L.J. at p. 826, Kennedy L.J. at p. 830.

[3] See para. 792.

[4] *Hall* v. *Lees*, [1904] 2 K.B. 602. No distinction is drawn in this case between the professional and the administrative duties of the nurse, and it is fairly clear that, if the Court had held the contract to be a contract to nurse the patient, they would have held the association liable without regard to whether the negligence was in a sphere in which the directors were capable of exercising control. The case therefore seems to conflict in principle with the hospital cases.

[5] *Hall* v. *Lees, supra*. See para. 799.

[6] *Lavelle* v. *Glasgow Royal Infirmary, supra*; *Hillyer* v. *Governors of St Bartholomew's Hospital, supra*. See para. 798.

Section 4.—Registration of Nurses.

Subsection (1).—*Restriction on Right to Use Title of Registered Nurse.*

801. There is no restriction upon the right to carry on the profession of sick nurse, but by the Nurses Registration (Scotland) Act, 1919,[1] it is provided that any person who, not being duly registered under the Act, at any time after 21st March 1923,[2] takes or uses the name or title of registered nurse, or any name, title, addition, description, uniform, or badge implying that he is registered under the Act or, being registered in some part of the register, uses any description implying that he is registered in some other part of the register, commits an offence.

Subsection (2).—*General Nursing Council for Scotland.*

802. The Act [3] set up the General Nursing Council for Scotland, with the duties of forming and keeping a register of nurses for the sick,[4] and of making rules regulating, *inter alia*, the conditions of admission to the register and of removal from and restoration to the register.[5]

Subsection (3).—*The Register.*

803. The register consists of six parts: (1) general, (2) male nurses, (3) nurses trained in the nursing and care of persons suffering from mental diseases, (4) sick children's nurses,[6] (5) fever nurses, and (6) nurses for mental defectives.[7] To obtain admission to the register it is now necessary to fulfil the prescribed conditions.[8] Putting it generally, a person applying for admission must be at least twenty-one years of age and of good moral character. She must undergo a course of training in an approved hospital, which varies in duration according to circumstances from one to four years. She must undergo systematic instruction and pass the preliminary and final examinations. The rules for admission, except as regards existing and intermediate nurses,[9] deal entirely with female nurses.[8]

804. The period for taking advantage of the provision [10] under which nurses engaged in practice before the Act ("existing nurses") might obtain registration without fulfilling these conditions expired on 21st March 1923.[11] The category of "intermediate nurses," apparently invented by the Council and consisting of those who were not existing nurses, but desired to obtain registration before the Rules came into operation on 21st December 1922,[1] is now of no importance.

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[1] 9 & 10 Geo. V. c. 95, s. 8 (1).

[2] S.R. & O., 1924 (No. 479), p. 1408.

[3] Sec. 1.

[4] Sec. 2.

[5] Sec. 3.

[6] These parts are provided for by s. 2 (2) of the Act.

[7] Parts (5) and (6) were added by the Council under the powers conferred by s. 2 (2) (*e*) and s. 3 (1) (*g*). See Rule 16.

[8] Rule 22 (*c*).

[9] Rules 21 (4) and 22 (2). See para. 804.

[10] Act, s. 3 (2) (*c*).

[11] S.R. & O., 1924 $\left(\text{No. } \frac{479}{\text{S. } 39}\right)$, p. 1408.

805. Although the Act does not expressly give the Council power to remove nurses from the register, it does give it power to make rules prescribing the manner of removal.[2] The Council has taken power to remove the name of any registered nurse who has been convicted of a felony or misdemeanour or crime or offence, or has been guilty of any misconduct.[3] Any person aggrieved by the removal of his name from the register has a right of appeal to the Court of Session in manner provided by Act of Sederunt.[4] The Act of Sederunt, dated 12th March 1930, regulates procedure and provides a form of note of appeal. The note must, *inter alia*, set forth the decision appealed against and contain a crave for an order on the Council to lodge a statement of the facts on which their decision proceeded. The question for the Court presumably then is whether on the facts stated the Council was entitled to come to its decision.

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[1] S.R. & O., 1924 $\left(\text{No. } \frac{479}{\text{S. } 39}\right)$, p. 1408.

[2] Sec. 3 (1) (*d*).

[3] Rule 27. As to the meaning of "misconduct," see *Stock* v. *Central Midwives Board*, [1915] 3 K.B. 756.

[4] Sec. 7.

OATH DE FIDELI ADMINISTRATIONE.

See COMMISSION AND DILIGENCE; NOTARY PUBLIC.

OATH IN BANKRUPTCY.

See SEQUESTRATION.

OATH, JUDICIAL.

OATH, OFFICIAL.

See OATHS (PROMISSORY).

OATH OF ALLEGIANCE.

See OATHS (PROMISSORY).

OATH OF CALUMNY.

See DIVORCE; MARRIAGE.

OATH OF CREDULITY.

See OATH ON REFERENCE; SEQUESTRATION.

OATH OF JUROR.

See JURY TRIAL.

OATH OF VERITY.

See OATH ON REFERENCE; SEQUESTRATION.

OATH OF WITNESS.

See WITNESS.

OATH ON REFERENCE.

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SECTION 1.—INTRODUCTORY.

806. The common law recognised three different modes of proving facts, viz. (1) proof by writ, (2) proof by witnesses, and (3) proof by oath of party.[1] Proof by oath of party was derived from the Roman law. The oath itself assumed a number of forms with varying effect according to the circumstances in which it was tendered. In a limited class of actions, where proof by writ or by witnesses could not reasonably be required, a party was, upon certain conditions being fulfilled, entitled to tender his own oath in support of his case, *i.e.* his oath *in litem*[1] or in supplement.[2] On the other hand, it was a general rule that a party might refer the facts in issue to the oath of his opponent, *i.e.* his oath of credulity,[3] or of verity.[4]

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[1] Stair, iv. 42, 1.

807. The policy underlying the reference by one party to the oath of the other party was primarily in order to prevent actions being litigated or judgment obtained contrary to conscience and belief.[5] The oath of credulity, except in one special case,[6] has become obsolete. In current practice a reference to oath is always a reference to oath of verity. The oath of verity still survives, possibly because, in addition to the nebulous function of guarding against unconscionable actions, it had at an early date become a mode of supplying the want of evidence *ubi non deficit jus sed probatio*,[7] and had become crystallised as a mode of proof in the statutes introducing the short prescriptions.[8] As a mode of proof the oath of verity is an anomalous proceeding in an age when parties are competent witnesses. The deposition emitted in an oath on reference is not regarded as being evidence documentary or parole,[9] and the evidence of an opponent adduced by the party as a witness cannot have the effect of a reference to his oath.[10]

808. A reference to oath, when the Court has interponed authority and when the party whose oath is referred has appeared and deponed, forms a judicial contract between the parties. The party making the reference contracts that, when emitted, the oath shall be conclusive of the facts referred, but not that it shall be conclusive of any other fact.[11] The oath is applied by the Court upon an interpretation which treats the deposition as self-contained and self-explanatory, and which endeavours to ascertain, What did the deponent mean? without reference to whether he is to be believed.[12]

SECTION 2.—AT WHAT STAGE REFERENCE COMPETENT.

SUBSECTION (1).—*Before Answer.*

809. Reference to oath being essentially an appeal from the adjudication of the Court to the conscience of the party, it is available only where the Court is competently seized of a *lis*, and it ought not to be allowed before answer except in very special circumstances. On an open record, owing to the great age of the party whose oath was to be referred to, the Court has allowed a reference before answer and the oath has been taken to lie *in retentis.*[1] This course, however, was followed of consent of parties, and doubt as to the competency was expressed by the Court. The Court has also sustained a reference before answer where a plea of competent and omitted was stated by the party whose oath was referred to.[2] Where the party referring has stated preliminary pleas the reference will not be sustained under reservation of such pleas.[3] Where the preliminary pleas of a party are undisposed of, a reference by him in general terms will be held to be a departure from such pleas.[4] Questions of the relevancy of averments cannot competently be referred to oath.[5] Pure questions of law or of construction cannot be referred.[6]

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[1] Dickson, 2nd ed., ii. 893. [2] *Ibid.*, p. 899. [3] *Ibid.*, p. 908. [4] *Ibid.*, p. 914.

[5] *Pattinson* v. *Robertson*, 1846, 9 D. 229; *Adam* v. *Maclachlan*, 1847, 9 D. 576.

[6] The oath *de calumnia* administered in actions of divorce is the only form of the old oath of credulity which still survives. It is now compulsory and not dependent upon a reference being made by the defender. See 11 Geo. IV. and 1 Will. IV. c. 69, s. 36.

[7] *Adam* v. *Maclachlan*, *supra*, per Lord Justice-Clerk Hope.

[8] Acts 1579, c. 83; 1669, c. 9; see also 12 Geo. III. c. 72.

[9] *Longworth* v. *Yelverton*, 1865, 3 M. 645, per Lord Pres. M'Neill and Lord Curriehill and approved; 1867, 5 M. (H.L.) 144.

[10] Evidence Act, 1853, s. 5. [11] *Chrystal* v. *Chrystal*, 1900, 2 F. 373.

[12] *Cowbrough & Co.* v. *Robertson*, 1879, 6 R. 1301, at p. 1306.

SUBSECTION (2).—*After Answer and before Judgment.*

810. The general rule is that reference to oath will be allowed only after all preliminary pleas have been disposed of. The facts to be referred must be averred in a competent process.[7] The title to sue or to defend of the party whose oath is referred to must have been admitted or proved.[3] The averments of fact to be referred must be made with sufficient specification.[8] The action in which they are averred must be relevant and sufficient in law to support the conclusion.[9]

811. A party by renouncing probation *simpliciter* does not lose the right to refer to his opponent's oath.[10] The institutional writers consider that, as a condition of the reference being allowed, the party referring must depone that he has no further probation, and in particular no writ.[11] The modern practice is to find that the proof has failed or has been renounced before the reference is sustained. When the reference is made before judgment on the merits it is competent to refer particular matters of fact, leaving other branches of the case to be proved *aliunde.* Where the case is one involving mixed questions of fact and law, "the party to whom the reference is made seems entitled to insist that the separation shall be made in so far as it can be clearly done." [12]

SUBSECTION (3).—*After Judgment and before Extract.*

812. "It has been a fixed rule of the law of Scotland for centuries that a party, pursuer, or defender, even after all other methods of discussion or evidence have failed, may say to his adversary before the Court, though I cannot produce evidence to shew the truth, I appeal it to your own oath, to your conscience as a Christian man."[1] It is clear that a reference is competent at any time before extract.[2] Where a decree disposing of the merits had been extracted, but the auditor's report on expenses had not been approved or decerned for, a reference to oath was sustained.[3] And after final judgment by the House of Lords a reference to oath is still open, at least before the judgment has been applied.[4] In the Bill Chamber where a note of suspension had been refused, but before a certificate of refusal was issued, a reference was sustained.[5] Where a certificate of refusal had been issued, and the Inner House had adhered and remitted to the Lord Ordinary to dispose of the question of expenses, a reference was also sustained.[6]

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[1] *Riley* v. *M'Laren,* 1853, 16 D. 323.

[2] *Grant* v. *Marshall,* 1851, 13 D. 500.

[3] *Henderson* v. *Smith,* 1852, 14 D. 583.

[4] *Turnbull* v. *Borthwick,* 1830, 8 S. 735; *M'Donald* v. *Burden,* 1829, 7 S. 306.

[5] *Sawers* v. *Clark,* 1892, 19 R. 1090, at p. 1092.

[6] *Taylor & Sons* v. *Hall,* 1829, 7 S. 565; *Connacher* v. *Robertson,* 1829, 8 S. 141; *Grubb* v. *Porteous,* 1835, 13 S. 603; *Anstruther* v. *Wilkie,* 1856, 18 D. 405; *Kirkpatrick* v. *Bell,* 1864, 2 M. 1396.

[7] *Hamilton* v. *Main,* 1823, 2 S. 356; *Macfarlane* v. *Watt,* 1828, 6 S. 1095.

[8] *Phœnix Insurance Co.* v. *Young,* 1834, 12 S. 921; *Napier* v. *Graham,* 1874, 1 R. 906.

[9] *Maclaren* v. *Buick,* 1829, 7 S. 780.

[10] *Anstruther* v. *Wilkie, supra.*

[11] Stair, iv. 44, 2; Ersk. iv. 2, 8; Bell's Prin., s. 2263.

[12] *Lawson* v. *Murray,* 1829, 7 S. 380.

813. After adverse judgment on the merits, a party must refer the whole facts, or at least such part of them as will be conclusive in his favour.[7] Thus in an action of affiliation, where the pursuer had succeeded in proving only that she had given birth to an illegitimate child, the Court held that fact established and as to the remainder of the case sustained a reference to oath.[8]

SECTION 3.—TO WHOSE OATH REFERENCE MAY BE MADE.

SUBSECTION (1).—*General Rules.*

814. The only general rules on this head are that, when the reference is imposed by one or other of the statutes limiting the mode of proof, the reference must be to the party indicated by the statute; and when the reference is not imposed by statute it must be made to the party who has the substantial interest in the cause.[9]

SUBSECTION (2).—*In Triennial Prescription.*

815. Where the triennial prescription applies, the creditor is required to prove the debt "be aith of his partie."[10] He may not do so by the oath of that party's manager.[11] In an action against joint owners of a ship for a prescribed account for goods ordered by one of them, a reference was made to the oaths of all of them, and the depositions were negative, with the exception of that of the joint owner who had given the order, whereupon decree was pronounced against him alone.[1] In an action for a prescribed debt incurred by a wife partly before marriage and partly after marriage, both spouses were sued, and the constitution of the debt was referred to the oath of the wife and the resting-owing to the oath of the husband.[2]

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[1] *Pattinson* v. *Robertson*, 1846, 9 D. 226, at p. 229.

[2] *Broom & Co.* v. *Edgley*, 1843, 5 D. 1087; *Kirkpatrick* v. *Bell*, 1864, 3 M. 252.

[3] *Drew* v. *Drew*, 1855, 17 D. 784.

[4] *Longworth* v. *Yelverton*, 1865, 3 M. 645; 1867, 5 M. (H.L.) 144.

[5] *Macdonald* v. *Cooper*, 1848, 10 D. 740.

[6] *Brown* v. *Ferguson*, 1852, 14 D. 841.

[7] *White* v. *Murdoch*, June 9, 1812 F.C., and *Cowan* v. *M'Cormack* noted there; *Campbell* v. *Turner*, 1822, 1 S. 500; *Sinclair* v. *M'Beath*, 1869, 7 M. 934.

[8] *Cameron* v. *Armstrong*, 1851, 13 D. 1256.

[9] *Nisbet's Trs.* v. *Morrison's Trs.*, 1829, 7 S. 305; *Easton* v. *Johnston*, 1831, 9 S. 440; *M'Nab* v. *Lockhart*, 1843, 5 D. 1014; *Broom & Co.* v. *Edgley*, 1843, 5 D. 1087, at p. 1094.

[10] Act 1579, c. 83.

[11] *Bertram* v. *Stewart's Trs.*, 1874, 2 R. 255.

816. Where a railway company was sued by a stockbroker for a debt falling under the triennial prescription, a reference was proposed to the oath, (1) of the defenders, and (2) of the defenders, the chairman and directors of the company, and the secretaries, solicitors, and treasurers comprehending the parties who have power to bind the company, or some of them; but both branches were refused on the ground that it was not said that any particular individual had been "the party to the contract of debt." [3] In an action of multiplepoinding and exoneration in which the trustees as pursuers and real raisers had been discharged, a competition ensued between a residuary legatee and a creditor claiming remuneration for "labour"; his claim having prescribed, it was held that the reference should be to the oath of the residuary legatee and not of the trustees.[4]

SUBSECTION (3).—*In Quinquennial Prescription.*

817. Where the quinquennial prescription applies, the statute requires the debts to be proved due and resting-owing "by the defenders their oaths." [5]

SUBSECTION (4).—*In Sexennial Prescription.*

818. Where the sexennial prescription applies, the statute requires the debts and their resting-owing to be proved by the oath "of the debtor." [6]

SUBSECTION (5).—*In Vicennial Prescription.*

819. Where this prescription applies, the statute requires the verity of the holograph writ to be proved "by the defender's oath." [5]

SUBSECTION (6).—*In Common Law References.*

820. In cases outwith the statutes, exceptions are allowed to the general rule that the reference must be to the party having the substantial interest, in cases where one person fully represents another or a number of others. This representation, however, is not coextensive with the representation which enables one person to make a simple admission binding on another. Historically, the element of being incompetent as a witness in the party's cause appears to have been an essential though not a conclusive element in the full representation which rendered competent a reference to his oath in place of the party's oath. It is accordingly necessary to consider individually the instances of representative capacity in this sense.

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[1] *Duncan* v. *Forbes*, 1831, 9 S. 540.

[2] *Mitchells* v. *Moultrys*, 1882, 10 R. 378.

[3] *White* v. *Caledonian Rly. Co.*, 1869, 7 M. 583.

[4] *Farquhar* v. *Farquhar*, 1886, 13 R. 596.

[5] Act 1669, c. 9.

[6] 12 Geo. III. c. 72, s. 39.

(i) *Agency.*

821. It has been held incompetent to refer to a party's law agent the terms of a settlement which he obtained for the party as his client.[1] And it has likewise been held incompetent to refer to the oath of a son the conditions of a contract which he entered into on his father's behalf.[2] It is probable, however, that where a party entrusts the whole conduct of a concern to a general manager, the transactions had in the course of that management may be referred to the oath of the manager as binding the principal. Thus a reference has been sustained to the oaths of the provost and magistrates of a burgh,[3] and to the clerk of road trustees.[4]

(ii) *Copartnery.*

822. Where there is a managing partner it would appear that in an action against the firm the reference may be made to him alone.[5] It has been suggested that in an action against a firm the constitution of a debt incurred in the ordinary course of the partnership business might be referred to the oath of one of the acting partners.[6] Where, however, all the partners act in the business of the firm, it would appear incompetent to select one of them for the reference.[7] And where the partnership has been dissolved it is clear that a reference to one partner is incompetent.[8]

(iii) *Husband and Wife.*

823. A wife is presumed to be *praeposita rebus domesticis* of her husband, and accordingly one who sues the husband for the price of such furnishings may refer the debt to the oath of the wife as representing her husband.[9] Where any other special *praepositura* is proved or admitted, reference may likewise be made to the oath of the wife in place of her husband touching matters falling within it.[10] It appears to have been the law, however, that a husband taking on marriage his wife's property under the *jus mariti*, while incurring liability for her antenuptial debts, was not bound in an action of constitution after the marriage by the oath of his wife, on the ground apparently that the cedent's oath cannot be taken in place of the assignee's.[11] But *stante*

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[1] *Sawers* v. *Clark*, 1892, 19 R. 1090.

[2] *Kirkwood* v. *Wilson*, 1823, 2 S. 425.

[3] *Johnston* v. *Dean of Guild of Aberdeen*, 1676, Mor. 12480.

[4] *Dykes* v. *Hill*, 1828, 6 S. 479.

[5] *Gow* v. *M'Donald*, 1827, 5 S. 472.

[6] Dickson, s. 1450; Kirkpatrick, s. 199.

[7] *M'Nab* v. *Lockhart*, 1843, 5 D. 1014; *Broom & Co.* v. *Edgley*, 1843, 5 D. 1087.

[8] *Nisbet's Trs.* v. *Morrison's Trs.*, 1829, 7 S. 307; *M'Neill* v. *Campbell*, 1849, 11 D. 979; *Adam* v. *Maclachlan*, 1847, 9 D. 560.

[9] Dickson, s. 1454; Fraser, H. and W., i. 628; *Young & Co.* v. *Playfair*, 1802, Mor. 12486.

[10] Dickson, s. 1455; Fraser, H. and W., i. 628; *Barclay* v. *Binnie*, 1630, Mor. 12479.

[11] *Bruce* v. *Alexander*, 1676, 2 Bro. Supp. 193; and see "Cedent and Assignee," para. 830, *infra*.

matrimonio a reference to the wife's oath has been allowed in claims relating to property not falling under the *jus mariti*,[1] and in order to affect in anticipation her share of the goods in communion.[2]

(iv) *Parent and Child.*

824. A parent's liability for necessaries supplied to his child does not, it is thought, subject the parent to the hazard of his child's oath in an action for payment,[3] although apparently a reference in this form has been allowed at a time when the child was not a competent witness against his parent.[4]

(v) *Tutor and Pupil.*

825. In actions affecting the pupil and his estate, the tutor is the proper party for reference.[5] It seems doubtful whether the tutor's oath, when he is *functus officio*, may be referred to in order to bind the pupil.[6] It is incompetent to refer to the oath of a factor *loco tutoris*, at least touching matters which occurred prior to his appointment.[7]

(vi) *Curator and Minor.*

826. In actions concerning minor *puberes* and their estates the reference should be to the oath of the minor and not of the curator.[8]

(vii) *Executors.*

827. When the office of executor was a beneficial one the reference, in an action against the estate, was properly made to the oath of the executor.[9] It affected the executry estate to the extent of his beneficial interest. An executor's oath would now be competent only where he was beneficially interested in the estate.

(viii) *Trustees.*

828. Where the radical right remains in the truster, it would appear that "no debt can be fixed against a truster by the oath of the trustee." [10] Where in the course of administration of testamentary trustees liabilities are incurred by them, the reference is properly made to their oaths.[11] As regards debts alleged to have been incurred by the truster in his lifetime, testamentary trustees are in the same position as executors.

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[1] *Gifford* v. *Rennie*, 1853, 15 D. 451.

[2] *Ker* v. *Covington*, 1627, Mor. 12489.

[3] Dickson, s. 1459.

[4] *Lauder* v. *Chalmers*, 1685, Mor. 12481 ; Tait, Evidence, p. 263.

[5] Stair, i. 6, 20 ; Ersk. iv. 2, 10 ; *Hepburn* v. *Hamilton*, 1661, Mor. 8465.

[6] *Waddel* v. *Wadderstoun*, 1707, Mor. 12484 ; Tait, Evidence, p. 262.

[7] *Stewart* v. *Syme*, 12th December 1815, F.C.

[8] *Forbes* v. *Pitsligo*, 1628, Mor. 12479 ; *Maitland* v. *Caschogill*, 1623, Mor. 8917 ; *Earl of Mar* v. *his Vassals*, 1628, Mor. 8918 ; *Somervell* v. *his Debtors*, 1670, 2 Bro. Supp. 497.

[9] Ersk. iv. 2, 10 ; *Monteith* v. *Smith*, 1624, Mor. 12477 ; *Scot* v. *Cockburn*, 1627, Mor. 12477 ; *Ker* v. *Covington*, 1627, Mor. 12478.

[10] Ersk. iv. 2, 10.

[11] *Murray* v. *Laurie's Trs.*, 1827, 5 S. 515.

(ix) *Co-owners.*

829. The oath of each co-owner is good against himself alone.[1]

(x) Correi Debendi.

830. The oath of each debtor is good against himself alone.[2] Stair expresses the view that a reference by the creditor to the oath of one of several *correi debendi* extinguishes the claim against all the *correi*, but this has been doubted by Erskine.[3] It is not clear whether, in order to prove resting-owing, it is necessary to refer to the oaths of all the co-obligants.[4]

(xi) *Cedent and Assignee.*

831. Before the assignation is intimated the debt may be extinguished by the oath of the cedent, thereafter it may not,[5] unless the subject assigned has been rendered litigious before intimation,[6] or the assignation has been made gratuitously,[7] or in trust for the cedent.[8]

(xii) *Bankruptcy.*

832. "The bankrupt's oath of verity seems to be competent in all questions of property or debt with third parties. But where the bankrupt from any peculiar interest or connection and relationship is placed in circumstances of great suspicion, an exception is admitted to the above rule and reference to his oath will not be sustained." [9] Bell's view of the law has been adversely commented on.[10] The sound view would appear to be that reference to the oath of an undischarged bankrupt or of a bankrupt discharged on a composition is incompetent to affect his creditors.[11] The anomalous position of a bankrupt has been expressed as follows:—"Our law holds a bankrupt so little of a party that he may be examined as a witness; and so much so that reference may be made to his oath." [12]

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[1] *Duncan* v. *Forbes*, 1831, 9 S. 540; *Dickson* v. *Blair*, 1871, 10 M. 41.

[2] Ersk. iv. 2, 10; *Allan* v. *Ormiston*, 1817, Hume 477.

[3] Stair, iv. 44, 8; Ersk. iv. 2, 10.

[4] *Christie* v. *Henderson*, 1833, 11 S. 744; *Black* v. *Black*, 1838, 16 S. 1220; *Darnley* v. *Kirkwood*, 1845, 7 D. 595, at p. 599; *Drummond* v. *Crichton*, 1848, 10 D. 340; *Boyd* v. *Fraser*, 1853, 15 D. 342.

[5] Stair, iii. 1, 18; Ersk. iii. 5, 9, and 6, 19; *Lord Pitfoddels* v. *Glenkindy*, 1662, Mor. 12454; *Boyd* v. *Storie*, 1674, Mor. 12456; *Crawfurd* v. *M'Carter*, 1676, Mor. 12458.

[6] Ersk. iii. 5, 10; *Sommerville* v. ——, 1673, Mor. 8325; *Houston* v. *Nisbet*, 1709, Mor. 8333.

[7] *Steel* v. *Orbiston*, 1679, Mor. 8467; *Fotheringhame* v. *Agnew*, 1684, Mor. 12460; *Aitchison's Assignees* v. *Drummond*, 1737, Elch. "Assignation," No. 3.

[8] Dickson, ss. 1473, 1475; *Knox* v. *Martin*, 1850, 12 D. 719.

[9] Bell, Com. ii. 330.

[10] *Adam* v. *Maclachlan*, 1847, 9 D. 560, per Lord Justice-Clerk Hope.

[11] *Mein* v. *Towers*, 1829, 7 S. 902; *Dyce* v. *Paterson*, 1846, 9 D. 310; *Thomson* v. *Duncan*, 1855, 17 D. 1081; *Campbell* v. *M'Neillie*, 1856, 18 D. 843; *Ferrier* v. *Graham*, 1831, 9 S. 419.

[12] *Mein* v. *Towers*, *supra*, per Lord Pitmilly, at p. 904.

(xiii) *Arrestee and Common Debtor.*

833. The arrester may refer the debt arrested to the oath of the arrestee, but a negative oath cannot hurt the common debtor [1] or his assignee.[2] As against the arrester the arrestee may refer to the oath of the common debtor any defence available to him as against the latter.[3]

SECTION 4.—WHETHER THE REFERENCE WILL BE SUSTAINED.

SUBSECTION (1).—*General.*

834. Before the reference can be carried into operation it must be sustained by an interlocutor of the Court. As a general rule the Court will sustain the reference where it is made at an appropriate stage and to the proper party. In determining whether or not to sustain a particular reference, however, the Court (*a*) applies certain further general rules of law, and (*b*) in addition exercises a judicial discretion to refuse a reference in circumstances which render it probable that justice might be perverted in the particular case.[4]

SUBSECTION (2).—*When the Reference must be Refused.*

835. A reference to oath of party may be regarded as incompetent in the following circumstances:—

(i) *Questions of Pure Law.*

836. While questions of pure fact and mixed questions of fact and law may be referred, a pure question of law cannot be referred.[5]

(ii) *Local Customs and Trade Usage.*

837. It is thought that such customs cannot competently be referred to oath of party,[6] except the custom in issue be the party's own custom as in the case of the custom of a barony.[7]

(iii) *Where Writ is a Solemnity.*

838. Reference to oath is a mode of proof and not a method of creating rights. Accordingly, where the right in issue is one requiring writ as essential to its constitution, a reference to oath is not competent.[8]

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[1] Ersk. iii. 6, 16; Bell, Com. ii. 67.

[2] *Elies* v. *Watson*, 1712, Mor. 14041; *Ferguson* v. *Maitland*, 1722, Mor. 14042; commented on, Ersk. iv. 2, 8.

[3] Ersk. iii. 6, 16; Dickson, s. 1477.

[4] *Ritchie* v. *Mackay*, 1829, 3 W. & S. 490; *Pattinson* v. *Robertson*, 1846, 9 D. 226; *Adam* v. *Maclachlan*, 1847, 9 D. 576; *Longworth* v. *Yelverton*, 1867, 5 M. (H.L.) 144; *Macleay* v. *Campbell*, 1876, 3 R. 999.

[5] *Taylor & Sons* v. *Hall*, 1829, 7 S. 565; *Connacher* v. *Robertson*, 1829, 8 S. 141; *Grubb* v. *Porteous*, 1835, 13 S. 603; *Anstruther* v. *Wilkie*, 1856, 18 D. 405; *Kirkpatrick* v. *Bell*, 1864, 2 M. 1396; *Sawers* v. *Clark*, 1892, 19 R. 1090.

[6] *M'Eachern* v. *Ewing & Co.*, 1824, 2 S. 724; 3 S. 9, 410; *Earl of Galloway* v. *Taylor*, 1627, Mor. 7194 and 12421; Dickson, s. 1426.

[7] *Rowallan* v. *Muir*, 1626, Mor. 12419.

[8] Stair, iv. 44, 5; Ersk. iv. 2, 9; *Dickson* v. *Blair*, 1871, 10 M. 41.

(iv) *In Criminal Proceedings.*

839. In criminal procedure a reference to the oath of the accused is incompetent,[1] and a reference to the oath of the prosecutor, public or private, would appear to be also incompetent.[2]

(v) *In Consistorial Causes.*

840. "No decree or judgment in favour of the pursuer shall be pronounced in any . . . consistorial action . . . until the grounds shall be substantiated by sufficient evidence."[3] It is thus not competent to refer the whole cause to the oath of the defender.[4]

(vi) *Oath of an* Incapax.

841. A reference to the oath of a pupil or a lunatic is incompetent.[5] It is not a good ground of objection, however, that the person referred to is a *minor pubes*,[6] or that old age has dulled his faculties,[7] or that he is deaf and dumb.[8]

(vii) *Party Examined as Witness.*

842. "It shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause or any part of it to his oath."[9] But where a proof at large was allowed *quoad* the unprescribed amount in an action for payment of salary, and a proof *scripto* was allowed *quoad* the prescribed part, it was held that the examination of the defender as a witness for the pursuer in the proof at large did not prevent a reference to his oath upon the resting-owing of the prescribed amount.[10] And examination of a party in an incompetent proof at large did not, on a subsequent allowance of proof *scripto*, prevent a reference to his oath.[11]

(viii) *After Arbitration.*

843. Where the Court has interponed authority to the finding of an arbiter or judicial referee, a reference to oath is probably incompetent.[12]

SUBSECTION (3).—*When the Reference may be Refused.*

844. The discretion of the Court to refuse to sustain the reference where justice is likely to be perverted thereby may be exercised in a variety of circumstances. But if the discretion is not so exercised either by reason of consent of parties or for want of objection being stated, it is thought that the oath is competently taken and should be given effect to. The circumstances in which the Court has exercised or considered its discretion are as follows:—

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[1] Stair, iv. 44, 5; Ersk. iv. 4, 94.

[2] Hume, ii. 403; Alison, ii. 623; *Cameron* v. *Paul*, 1853, 1 Irv. 316.

[3] Court of Session Act, 1830, s. 36.

[4] *Longworth* v. *Yelverton*, 1867, 5 M. (H.L.), 144; see also *Monteith* v. *Robb*, 1844, 6 D. 934; and *Lindsay* v. *Lindsay*, 1927 S.C. 395.

[5] *Gordon's Tutor*, 1707, Mor. 8909.

[6] *Maitland* v. *Caschogill*, 1623, Mor. 8917; *Earl of Mar* v. *his Vassals*, 1628, Mor. 8918; *Somervell* v. *his Debtors*, 1670, 2 Bro. Supp. 497.

[7] *Nicolson* v. *M'Alister*, 1829, 7 S. 743.

[8] —— v. *Carnegie*, 1710, 4 Bro. Supp. 805.

[9] Evidence Act, 1853, s. 5.

[10] *Dewar* v. *Pearson*, 1866, 4 M. 493.

[11] *Swanson* v. *Gallie*, 1870, 9 M. 208.

[12] *M'Laren* v. *Shore*, 1883, 10 R. 1067, per Lord Mure and Lord Shand.

(i) *Incriminating Matters.*

845. In civil proceedings a reference to oath will not be sustained where the tendency of the reference is to oblige the party to incriminate himself.[1] The party referred to must take the objection when the Court is moved to sustain the reference, and if no objection is stated the party must depone and his oath will be given effect to.[2] The objection does not extend to acts inferring only moral turpitude.[3]

(ii) *Third-party Interests.*

846. Where it appears to the Court that third-party interests may be adversely affected by the effect of the oath the reference will be refused. This form of objection has generally occurred where the legal title and beneficial interest have been divided, and has sometimes led the Court to allow the reference, reserving objections as to the effect of the oath.[4] In substance the point of third-party interest would appear to resolve itself into the question whether the party to whose oath reference was proposed truly held the substantial interest.[5] In a declarator of marriage, where the decision was that it was incompetent to refer the whole cause to the defender's oath, doubts were expressed as to whether the interests of third parties did not require that, even where competent, a reference to oath in consistorial causes should be disallowed.[6] Reference to the defender's oath of the promise in declarator of marriage by promise *subsequente cum copula* is undoubtedly competent. In view, however, of the doubts expressed in the House of Lords it may be open to question whether a reference of the promise would in every case be allowed to the defender's oath in a declarator of marriage.[7]

(iii) *Lack of Knowledge.*

847. A person should only be asked to depone *super facto proprio.* Where it appears that the party to whose oath reference is proposed could have no knowledge of the matter referred, the reference will not be sustained.[8]

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[1] Ersk. iv. 2, 9, Ivory's note; *Thomson* v. *Young*, 1828, 7 S. 32; *M'Callum* v. *M'Call*, 1825, 3 S. 551.

[2] *Gordon* v. *Gordon*, 1731, Cr. and St. 60; *Conacher* v. *Conacher*, 1859, 21 D. 597.

[3] *Cameron* v. *Armstrong*, 1851, 13 D. 1256.

[4] *Murray* v. *Laurie's Trs.*, 1827, 5 S. 515.

[5] See para. 821 *et seq.*, *supra*.

[6] *Longworth* v. *Yelverton*, 1867, 5 M. (H.L.) 144.

[7] *Lindsay* v. *Lindsay*, 1927 S.C. 395.

[8] *Kinnier* v. *Rae*, 1623, Mor. 8918; *Conacher* v. *Conacher*, *supra*.

(iv) *Party Cross-examined as Witness.*

848. Where a party adduced himself as a witness and was cross-examined by his opponent, a reference to his oath was disallowed although it was held that the objection did not fall under the statute.[1]

(v) Infamia juris.

849. A reference to the oath of a party convicted of fraud was refused on the ground that in the circumstances of that case a Court of Justice ought not to tender an oath to a party who had become infamous in consequence of the conviction of a crime.[2]

(vi) *Further Probation.*

850. According to the institutional writers the party referring was required to depone that he had no probation or no further probation, and in particular no proof by writ.[3] Where the party is possessed of further proof a reference to the oath of his opponent will not be sustained.[4]

(vii) *Delay.*

851. Where it appears that the object of the reference is to secure delay, it may either be refused *simpliciter*, or sustained only subject to consignation of the amount sued for,[5] or subject to payment of the expenses already incurred.[6]

SECTION 5.—PROCEDURE.

852. A reference to oath is made by lodging a minute of reference, enrolling the cause and moving the Court to sustain the minute. If the minute is sustained an interlocutor is pronounced in which a diet is fixed for taking the oath. The party referred to is cited to appear at the diet and is examined by the party referring.

SUBSECTION (1).—*Minute of Reference.*

853. It is irregular to make a reference to oath by way of averment and plea in law on record.[7] The reference ought to be made by minute so framed as to make it clear what facts are referred, whether the whole facts or some specified points of fact.[8] A reference of "the whole facts and circumstances in connection with the said bills" was held objectionable as being unspecific.[9] The minute is signed by counsel, and it is thought that counsel's general mandate embraces the power to refer.[10]

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[1] *Macleay* v. *Campbell*, 1876, 3 R. 999; Evidence Act, 1853, s. 5.

[2] *Ritchie* v. *Mackay*, 3 W. & S. 234.

[3] Stair, iv. 44, 2; Ersk. iv. 2, 8; Bell's Prin., s. 2264.

[4] *Lindsay* v. *Lindsay*, 1927 S.C. 395.

[5] *Pattinson* v. *Robertson*, 1846, 9 D. 226.

[6] *Aikman* v. *Aikman's Trs.*, 1868, 6 M. 277.

[7] *Thomson* v. *Wyld*, 1840, 3 D. 150.

[8] *Finlay* v. *Outram*, 1851, 14 D. 48, at p. 53.

[9] *Napier* v. *Graham*, 1874, 1 R. 906.

[10] Shand, Practice, i. 154; Mackay, Manual, p. 24; Dickson, s. 1444.

In the Inner House the appropriate paper is a note to the president of the division, but after final judgment a petition to the Court appears to be necessary.[1] In the Sheriff Court a minute is required by statute.[2]

SUBSECTION (2).—*Interlocutor sustaining the Minute.*

854. When the minute or other appropriate paper has been lodged it is necessary, in order that it may become effectual, that the authority of the Court should be interponed.[3] Where, however, a party has given his oath on reference, he cannot afterwards maintain that the reference was irregularly made.[4] The Court may construe procedure as amounting to an oath on reference, though no minute of reference is in process and no interlocutor of reference has been pronounced.[5] Any objections to emitting the oath on reference, or to the form of the minute, should be stated when the Court is moved to sustain the minute.

SUBSECTION (3).—*Retractation.*

855. After authority has been interponed to the minute of reference and before the oath is emitted, the party referring may retract the reference by leave of the Court and on payment of the expenses incurred by the party referred to.[6] The Court may, however, refuse leave to retract where it appears that the object of the retractation is improper or that the interests of the opposite party would suffer.[7]

SUBSECTION (4).—*Deference.*

856. Where a party whose oath has been referred to feels that he cannot depone distinctly upon the matter referred he may, instead of emitting his own oath on reference, move to defer the matter back to the oath of his opponent. It is then in the discretion of the judge to ordain that party to depone who has in his opinion the best opportunity of knowing the fact.[8]

SUBSECTION (5).—*Citation for Examination.*

857. The interlocutor interponing authority to the minute of reference and appointing a diet for the examination contains the warrant for citation. If a party cited personally or postally or edictally, as circumstances require, fails to compear he will be held as confessed.[9] The party may, on cause shewn, be reponed against an interlocutor holding him confessed. Where the application is made *de recenti*, slighter cause is sufficient, but where a considerable interval has elapsed only the most cogent cause will be regarded.[1] Where a party is reponed *ex justitia*, as *e.g.* on the ground that the citation was null, the effect of his confession is quite taken off; but if he be reponed *ex gratia* and die before deponing, the constructive confession holds good against his heir.[2] Payment of the expenses caused by failure to appear is generally a condition of being reponed, but if the party has been contumacious he may be required to pay the whole expenses in the cause as a condition of being reponed.[3]

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[1] *Longworth* v. *Yelverton*, 1865, 3 M. 645; *Scott and Livingston* v. *Donaldson*, 1831, 10 S. 174; *Winton & Co.* v. *Thomson*, 1862, 24 D. 1094.

[2] Sheriff Courts (Scotland) Act, 1907, First Schedule, rule 64.

[3] *Nicholson* v. *M'Leod*, 23rd November 1810, F.C.

[4] *Hewit* v. *Pollock*, 1821, 1 S. 167.

[5] *Hamilton* v. *Lindsay*, 1852, 14 D. 844.

[6] *Chalmers* v. *Jackson*, 18th February 1813, F.C.; *Binnie* v. *Black*, 1832, 10 S. 255.

[7] *Chalmers* v. *Jackson*, *supra*; *Galbraith* v. *M'Neill*, 1828, 7 S. 63; *Dick* v. *Hutton*, 1876, 3 R. 448.

[8] Stair, iv. 44, 13; Ersk. iv. 2, 8; *Galbraith* v. *M'Neill*, *supra*.

[9] Stair, iv. 44, 21; Ersk. iv. 2, 17; *Cant* v. *Lock*, 1665, Mor. 12029; Sheriff Court Act, 1907, First Schedule, rule 64.

SUBSECTION (6).—*Examination.*

858. The oath on reference is emitted, not before a jury, but before the judge or a commissioner appointed by him.[4] The oath is administered to the party in the same sense as it is administered to a witness. The party may now affirm instead of swearing.[5]

859. The party is then examined by or on behalf of the party making the reference. He is examined touching the facts referred, or such part of them as the party making the reference thinks sufficient for his purpose.[6] He is bound to answer all relevant questions under pain of being held as confessed.[7] The deponent is entitled to the assistance of counsel at his examination, but his counsel is not allowed to cross-examine on behalf of his client.[8] He may, however, suggest questions to the judge or commissioner, who will, if he think it right, put them to the deponent for the purpose of clearing up any matter which the deposition has left obscure.[9] The deponent's legal adviser may also refer his client to documents and object to incompetent questions.[10] It is *pars judicis* to ask such questions as may appear to the judge proper for eliciting the whole truth of the case referred, whether those questions are agreeable to the parties or not.[11]

860. It is of the essence of reference to oath that the fullest opportunity should be given to the deponent to tell his own story, and anything like judicial refusal to hear what the deponent has to say, even though not in answer to his opponent's questions, has been held to be deviation in point of form in the sense of the Small Debt Acts.[12] While documents may be shewn to the deponent for the purpose of assisting his memory or receiving his explanations, it is incompetent to put them to him for the purpose of contradicting his oath.[1] The examination ought to be conducted on the principle of an examination-in-chief and not of a cross-examination, *i.e.* the examination should proceed from special interrogation to general, and not from general interrogation to special.[2]

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[1] Stair, iv. 44, 23; Ersk. iv. 2, 17; *Buchanan* v. *Logie*, 1676, Mor. 12034.

[2] Ersk. iv. 2, 17; *Wright* v. *Lord Rutherford*, 1686, Mor. 12036; *Gilmour* v. *Stewart*, 1797, Mor. 12042; *M'Laurin* v. *Stewart*, 1832, 10 S. 333; *Grant* v. *M'Gregor*, 1839, 1 D. 1048.

[3] *Drummond* v. *Gilmour*, 1832, 10 S. 266; *Miller* v. *Cooper*, 1835, 13 S. 369; *Mitchells* v. *Moultrys*, 1882, 10 R. 378.

[4] *Allan* v. *Thomson*, 1822, 3 Mur. 3; *Gordon* v. *Gordon*, 1731, Cr. & St. 60; *Forman* v. *Bookless*, 1864, 2 M. 787; Evidence (Scotland) Act, 1866.

[5] Oaths Act, 1888.

[6] *Heddle* v. *Baikie*, 1841, 3 D. 370.

[7] *Murray* v. *Murray*, 1839, 1 D. 484.

[8] *Blair* v. *M'Phun*, 1856, 18 D. 1202.

[9] *Hislop* v. *Runcie*, 1894, 22 R. 83.

[10] Dickson, s. 1486.

[11] *Soutar* v. *Soutar*, 1851, 14 D. 140.

[12] *Paterson* v. *Cowie's Exr.*, 1904, 7 F. (J.) 68.

SUBSECTION (7).—*Re-examination.*

861. It is in the discretion of the Court to allow a re-examination to be held where the interests of justice require. When allowed, the re-examination is conducted in exactly the same way as the original examination. Re-examination has been allowed where the first examination did not exhaust the reference,[3] or was too doubtful to be conclusive,[4] or was unintelligible, or where it is desirable that documents referred to by the deponent should be before the Court,[5] or that the deponent should have an opportunity of refreshing his memory by consulting his books,[6] or other writings,[7] and where the person referring had, owing to an irregularity in fixing the diet, been absent when the deposition was emitted.[8] Where re-examination has become impossible, through the conduct of the party referring, he must bear the burden of his fault and the original deposition must stand.[9]

SUBSECTION (8).—*Recording the Deposition.*

862. According to the older practice, the deposition was taken down in long-hand by the clerk under direction of the judge or commissioner as the case might be,[10] and was read over to and signed by the deponent. The deponent on refusing to sign the deposition without good cause has been held as confessed.[11] The deposition is now taken down in shorthand, whether in the Court of Session,[12] or in the Sheriff Court.[13]

SUBSECTION (9).—*Exhausting the Reference.*

863. Where there is a joint reference to two or more parties it is not exhausted until all have deponed.[14] A reference is not exhausted, and re-examination may be allowed, until all the matters referred have been deponed to.[1] The party referring is not under obligation to put all the points referred to the deponent, provided that he puts sufficient to establish his case.[2] Where the trustee in a sequestration sued an account for furnishings supplied by the bankrupt, the defence was that the account had been settled and an entry discharging it made in the bankrupt's books. The pursuer replied that the entry was fraudulent and referred to the defender's oath "the verity of the alleged payment and all circumstances therewith connected and within the record." The defender deponed that he had not paid the account in cash, but considered it extinguished by a debt due to his son who consented that it should be so applied. The Court held that this negatived fraud in making the entry, and so was negative of the reference. The pursuer, however, was allowed a further reference of the general question of resting-owing.[3]

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[1] *Mowat* v. *Southesk*, 1673, Mor. 9421; *Boyd* v. *Kerr*, 1843, 5 D. 1213; *Heddle* v. *Baikie*, 1847, 9 D. 1254.

[2] Stair, iv. 44, 11; *Campbell* v. *Tait*, 1677, Mor. 9422; *Husband* v. *Blair*, 1678, Mor. 9422; *Aitken* v. *Finlay*, 1702, Mor. 9423; *Callander* v. *Wallace*, 1717, Mor. 9416; *Jameson* v. *Barclay*, 14th January 1820, F.C.; *Heddle* v. *Baikie*, 1841, 3 D. 370.

[3] *Megget* v. *Brown*, 1827, 5 S. 343 (318); *Paterson* v. *Thomson*, 1830, 8 S. 571.

[4] Ersk. iv. 2, 15; *Fotheringhame* v. *Mauld*, 1679, Mor. 16179; *Fraser* v. *Fraser*, 22nd June 1809, F.C.

[5] *Young* v. *Pollock*, 1832, 10 S. 570.

[6] *Anstruther* v. *Lewis*, 1851, 13 D. 841.

[7] *Mowat* v. *Southesk*, *supra*.

[8] *Peacock* v. *Smiles*, 1828, 6 S. 1081; *Ker* v. *Hopkirk and Imlach*, 1833, 12 S. 272; *Hill* v. *Cameron*, 1835, 13 S. 764.

[9] *Cooper* v. *Marshall*, 1877, 5 R. 258.

[10] *Nairn* v. *Ogilvie*, 1725, Mor. 12468.

[11] *Cairn* v. *Wilson*, 1672, Mor. 12532.

[12] Evidence Act, 1866, and Conjugal Rights Amendment Act, 1861, s. 13.

[13] Sheriff Courts Act, 1907, First Schedule, rule 65, superseding *Forman* v. *Bookless*, 1864, 2 M. 787.

[14] *Cleland* v. *M'Clellan*, 1851, 13 D. 504.

864. It sometimes happens that the party depones that, while he personally did not do the act in question, he instructed someone else to do it. Such an oath exhausts the reference, and does not operate devolution of the oath to the third party in order to ascertain whether he carried out the instruction.[4]

SECTION 6.—INTERPRETATION AND EFFECT OF THE OATH.

SUBSECTION (1).—*General.*

865. The effect of the oath is that it is conclusive of the matter referred according to its tenor. The party referring does not require to prove every part of the matter referred, provided he proves sufficient to make out his case.[2] The oath is conclusive in all subsequent proceedings, whatever may be their form, for the same interest, regarding the same matter, and upon the same *media concludendi.*[5] No question of credibility can arise, and the Court seeks only to ascertain the meaning of what the party has sworn. Thus the deposition, like a deed, should be construed by the judge and not by the jury.[6]

SUBSECTION (2).—*Adminicles of Interpretation.*

866. In interpreting the oath it is in general not permissible to consider the pleadings, written evidence, or oral testimony which may have been adduced in the cause.[7] Thus when the party deponed, "my letters shew how unwilling I was," and certain letters written by him were docqueted as relative to the oath, it was held not competent to look at the deponent's letters in order to interpret the oath.[8] Writings may, however, be exhibited to the party and he may be specially interrogated about the contents of them so as to make the writings themselves relevant to the interpretation.[1] When that course is followed it is not necessary to engross the documents in the deposition; a reference to them is sufficient.[2]

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[1] *Thomson* v. *Thomson*, 1830, 8 S. 571.

[2] *Heddle* v. *Baikie*, 1841, 3 D. 370, at p. 376.

[3] *Johnstone* v. *Law*, 1843, 5 D. 1372 ; 6 D. 201.

[4] *Mackay* v. *Ure*, 1849, 11 D. 982.

[5] Stair, iv. 44, 8 ; Tait, Evidence, p. 256.

[6] *Allan* v. *Thomson*, 1822, 3 Mur. 3.

[7] *Rule* v. *Hamilton*, 1623, Mor. 13231 ; *Kincaid* v. *Dickson*, 1673, Mor. 12143 ; *Young* v. *Pollock*, 1823, 10 S. 570 ; *Hunter* v. *Geddes*, 1853, 13 S. 369 ; *Nicol* v. *Law*, 1852, 14 D. 1044.

[8] *Broatch* v. *Dodds*, 1892, 19 R. 855.

867. When the party produces a document in confirmation of his oath the Court will, where the document does not confirm the oath, reject that part of the oath which purports, erroneously, to be an inference from the document.[3] Where the defender deponed that he had paid an item of account sued for by the hands of his factor as would appear from his factor's accounts and vouchers produced, and the factor's accounts and vouchers did not vouch the payment, it was held that the oath established the non-payment of the account.[4]

SUBSECTION (3).—Non Memini *and* Nihil Novi.

868. "Where one who makes oath . . . depones *non memini*, such oath has in the common case the effect of an absolvitory sentence in favour of him who hath sworn, . . . but since at the same time it does not import a denial of it, he who made the reference is allowed to support his plea by other methods of proof."[5] Where, however, such an oath is emitted as to a *factum proprium et recens*, of which the deponent cannot in the circumstances be credited with ignorance, the *non memini* or *nihil novi* is regarded as a cloak for dissembling and the deponent will be held as confessed.[6]

SUBSECTION (4).—*Vicarious Performance.*

869. Where the party depones that he instructed another to do an act, as, *e.g.* to pay an account, as regards the actual carrying out of which he himself has no knowledge, the interpretation may to some extent depend on the relationship between the deponent and the doer. If the doer is a relative or someone whose position would lead naturally to the fact of performance being communicated to the party, and it was not communicated, the oath will be interpreted as meaning that the act was not done.[7] Where a landowner deponed that he believed a prescribed account had been paid either by himself or his factor, but he could not recollect which, it was held that the oath was negative of resting-owing.[1] It has been questioned whether a deposition that the deponent believed payment of a prescribed account had been made by a third party was sufficient to negative the resting-owing.[2]

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[1] *Hunter* v. *Geddes*, 1853, 13 S. 369; *Gordon* v. *Pratt*, 1860, 22 D. 903; *Broatch* v. *Dodds*, 1892, 19 R. 855.

[2] *Jackson* v. *Cochrane*, 1873, 11 M. 475.

[3] *Cooper* v. *Hamilton*, 1824, 2 S. 728; *Blair* v. *Balfour*, 1748, Mor. 13217; *Brown* v. *M'Intyre*, 1828, 6 S. 1022; *Stevenson* v. *Stevenson*, 1838, 16 S. 1088; *Gordon* v. *Pratt*, 1860, 22 D. 903.

[4] *Cooper* v. *Hamilton*, 1826, 2 W. & S. 59.

[5] Ersk. iv. 2, 14; *Fisher* v. *Lithgow*, 1672, Mor. 12142; *Earl of Melvil* v. *Earl of Perth*, 1693, 4 Bro. Supp. 171.

[6] *Irving* v. *Carruthers*, 1675, Mor. 12031; —— v. *Littlegill*, 1682, Mor. 12035; *Murray* v. *Murray*, 1839, 1 D. 484; *Crow* v. *Fowlie*, 1865, 1 S.L.R. 86.

[7] *Paul* v. *Allison*, 1841, 3 D. 874; *Crichton* v. *Campbell*, 1857, 19 D. 661.

Subsection (5).—*Qualified Oaths.*

870. The admission contained in an oath is often verbally qualified by the deponent in an effort to limit its import. The question then arises whether the qualification is intrinsic or extrinsic of the admission. In the one case it must be given effect to as part of the oath, in the other it may be disregarded as irrelevant to the matter referred. A qualification may be in part intrinsic and in part extrinsic.[3] In cases under the statutes enacting the triennial, quinquennial, and sexennial prescriptions, the pursuer must prove the resting-owing as well as the constitution of the debt, and accordingly the question of discharge is intrinsic.[4] In cases which do not fall under these statutes, "the nature both of the debt sued for and of the payment made is to be considered." [5] In considering the nature of the debt, the rule *unumquodque eodem modo dissolvitur quo colligatur* is to be kept in view.

(i) *As regards Constitution of Obligations.*

871. Where the question referred is the constitution of loan, it is an intrinsic qualification that the money was received in payment of services,[6] or in payment of a debt due,[7] or on the footing that it should be imputed to account of board and lodging,[8] or on the footing that it should be repaid only at the request of the lender since deceased,[9] or that it was a gift.[10] Where the question referred is the making of an agreement, it is an intrinsic qualification that an agreement made verbally should only become binding when reduced to writing.[11]

872. Where the question referred is the constitution of debt by a bill prescribed, it is an intrinsic qualification that the bill was signed in mistake for a receipt,[12] or on the condition that it should not constitute a debt,[13] or that it was earmarked for a special purpose to which the payee had not applied it.[14]

873. Where the question referred is the earning of wages under a contract of employment, it is an intrinsic qualification that the services were rendered in pursuance of an agreement to take board and lodging as remuneration,[1] or that the services were not rendered in the capacity contracted for.[2]

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[1] *Cooper* v. *Hamilton*, 1824, 2 S. 728 (609); reported on another point, 1826, 2 W. & S. 59.

[2] *Mette & Carl* v. *Dalyell*, 1830, 8 S. 387.

[3] *Graham* v. *Kennedy*, 1860, 22 D. 560.

[4] *Fenning* v. *Meldrum*, 1876, 4 R. 148.

[5] Ersk. iv. 2, 13.

[6] *Gow's Exrs.* v. *Sim*, 1866, 4 M. 578.

[7] *Aitken* v. *Finlay*, 1702, Mor. 9423, 13205; *Minty* v. *Donald*, 1824, 3 S. 394 (277); *Sinclair* v. *Sinclair*, 1703, Mor. 13205.

[8] *Thomson* v. *Duncan*, 1855, 17 D. 1081.

[9] *Meikle* v. *Tennant*, 1737, Mor. 13225; *Gayler* v. *Crighton*, 1854, 27 Sc. Jur. 35.

[10] *Penney* v. *Aitken*, 1927, S.C. 673.

[11] *Campbell* v. *Douglas*, 1676, Mor. 8470, 13203.

[12] *Agnew* v. *Macrae*, 1782, Mor. 13219.

[13] *Baird* v. *Little's Trs.*, 1827, 5 S. 820.

[14] *Drummond* v. *Crichton*, 1848, 10 D. 340.

874. Where the reference is made in an action for the price of goods, it is an intrinsic qualification of the defender's oath that the goods were furnished but not upon his credit,[3] or subject to an agreement that payment was to be made not in money but in services which he was ready to perform, or that payment was to be made by supplying goods *e contra*,[4] or that he purchased them in his capacity of factor to a creditor of the seller,[5] or that they were supplied but rejected as of bad quality.[6]

875. In claims for the restitution of moveables the defender's admission that he received them is intrinsically qualified by his oath that he received them in a gift.[7] In an action for wrongful intromission with moveables it is an intrinsic qualification that the intromission was by the Court's authority, or by consent, or with the approbation of the party.[8]

876. In general, an admission of contract obligation is intrinsically qualified by conditions or stipulations which are *pars ejusdem negotii* with the principal obligation.[9] But where the verbal qualification amounts only to a ground for avoiding the obligation it will be held to be extrinsic to the reference.[10]

(ii) *As regards Resting-owing of Debts.*

877. An admission that the debt was constituted by writing is not intrinsically qualified by the simple deposition that it was discharged, according to the maxim *unumquodque eodem modo dissolvitur quo colligatur*.[11] And where, although the debt was not constituted by writing, the payment of it would naturally be vouched by a writing, a bare deposition that the debt was repaid will be regarded as an extrinsic qualification.[12] Where, however, the qualification is to the effect that the writ constituting the debt was cancelled at the time of repayment, or that a written voucher for the repayment was taken, it would appear to be intrinsic.[13] Where the debt was not constituted by writing, and repayment would not in ordinary course be vouched by writing, a bare deposition that the debt was repaid will be read as an intrinsic qualification of an admission of its constitution.[1]

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[1] *Alcock* v. *Easson*, 1842, 5 D. 356; *Anderson* v. *Halley*, 1847, 9 D. 1222.

[2] *Paden* v. *Govan*, 1751, Mor. 13207.

[3] *Meyer and Mortimer* v. *Lennard*, 1851, 14 D. 99.

[4] *Lauder* v. *M'Gibbon*, 1727, Mor. 13206; *Cowbrough & Co.* v. *Robertson*, 1879, 6 R. 1301; *Thomson's Exr.* v. *Thomson*, 1921, S.C. 109.

[5] *Campbell* v. *Grierson*, 1848, 10 D. 361.

[6] *Trotter* v. *Clark*, 1687, Mor. 13204; Stair, iv. 44, 14.

[7] *Fenton* v. *Drummond*, 1632, Mor. 13228; *Scot* v. *Elliot*, 1672, Mor. *ibid.*

[8] *Mortimer* v. *Archibald*, 1710, Mor. 13230; *Howies* v. *Wylie*, 1765, Mor. 13208; *Walker* v. *Clerk*, 1702, Mor. 13230; Stair, iv. 44, 14.

[9] Ersk. iv. 2, 11; *Meikle* v. *Tennant*, 1737, Mor. 13225; *Ewing* v. *Dundas*, 1749, Mor. 13226; *Robertson* v. *Thomson*, 1824, 3 S. 186 (127); *Greig* v. *Boyd*, 1830, 8 S. 382.

[10] *Carse* v. *Kennedy*, 1714, Mor. 13247; *Campbell* v. *Scotland*, 1778, Mor. 9530; *Macneill* v. *Mackissock*, 28th February 1805, F.C.; *Clarkson's Trs.* v. *Gibson*, 8th June 1820, F.C.; Dickson, ss. 453 and 1514.

[11] Ersk. iv. 2, 13; Dickson, s. 1514.

[12] *Cant* v. *Lock*, 1665, Mor. 13222.

[13] *Brown* v. *Mitchell*, 1669, Mor. 13202; *Walker* v. *Clerk*, *supra.*

878. "Things that are properly pertinent to the discharge or settlement of a debt in the natural course of proceeding are intrinsic in their quality, while on the other hand separate transactions which raise questions of counter-claims requiring constitution, if the claim stood alone, are extrinsic." [2] Accordingly, where the party to whose oath reference has been made admits receipt of an advance, but alleges a counter-claim, the allegation is extrinsic. Similarly, where compensation by another debt is alleged, the proper course is to treat the qualification as extrinsic, grant decree for the debt sued for, and allow the deponent to sue for the debt due to him.[3]

879. Where the party depones that a settlement of accounts took place, in which the advance was taken into account and the balance struck, the qualification is intrinsic.[4]

880. A debtor's oath was held to be intrinsically qualified where he deponed that his creditor, deceased, from whom he had received a loan, and to whom he had granted an I.O.U., had forgiven him the debt and promised to destroy the I.O.U., and the I.O.U. was not found in the deceased's repositories.[5]

881. In cases in which the debtor depones to the extinction of the debt otherwise than by payment, the rule is that if the oath bear that the creditor actually agreed, either at the time of the contraction of the debt, or by subsequent express agreement, to hold the debt compensated either by a counter-claim, or by acceptance of goods as payment of it, that will be intrinsic, but if the oath merely import that without any such agreement the debtor delivered goods or assigned accounts or made over some asset which he considered to be a set-off against his debt, that will be extrinsic.[6]

(iii) *As regards Receipt of Money.*

882. Where upon reference being made to the pursuer's oath he admits receiving a payment from the defender, but depones that the payment was not made in satisfaction of the debt sued for, but in pursuance of another separate bargain, the quality is intrinsic.[7] But if he merely depones that the payment was received on the footing of an indefinite payment, the quality would appear to be extrinsic.[8]

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[1] *Newlands* v. *M'Kinlay*, 1885, 13 R. 353.

[2] *Galbraith* v. *Cuthbertson*, 1886, 4 M. 295, per Lord Pres. M'Neill at p. 298.

[3] *Thomson* v. *Duncan*, 1855, 17 D. 1081.

[4] *Mackay* v. *Monro*, 1871, 8 S.L.R. 438.

[5] *Galbraith* v. *Cuthbertson*, 1866, 4 M. 295; *Hamilton's Exrs.* v. *Struthers*, 1858, 21 D. 51; *Balfour* v. *Simpson*, 1873, 11 M. 604.

[6] Dickson, ss. 1522–1528; *Stewart* v. *Robertson*, 1852, 15 D. 12; *Cooper* v. *Marshall*, 1877, 5 R. 258; *Cowbrough & Co.* v. *Robertson*, 1879, 6 R. 1301; *Thomson's Exr.* v. *Thomson*, 1921, S.C. 109.

[7] Ersk. iv. 2, 12; *Forbes* v. *Shaw*, 1688, Mor. 12732; *M'Lean* v. *Ogilvie*, 1700, 4 Bro. Supp. 487; *Sinclair* v. *Sinclair*, 1703, Mor. 13205; *Pringle* v. *Manderstoun*, 1708, Mor. 13230.

[8] *Reid* v. *Binning*, 1670, Mor. 13202; *Sinclair* v. *Sinclair*, *supra*.

SUBSECTION (6).—*Effect of Oath controlled by Record.*

883. The oath cannot be used to contradict what the deponent has unequivocally admitted on record.[1] Nor can it have the effect of establishing facts inconsistent with the opposite party's record.[2] Slight discrepancies, however, between the oath and the record have been overlooked.[3] In an action on loan, where the pursuer, *inter alia*, averred that he made payment of the sum to the defender on a particular date, and the defender denied this simpliciter, the cause was referred to the oath of the defender, who deponed that he received the payment but in a gift; it was held that the matter referred was the making of a contract of loan, and that the oath was negative of loan.[4]

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[1] *Darnley* v. *Kirkwood*, 1845, 7 D. 595.

[2] Dickson, s. 1421.

[3] *M'Donnell* v. *Ranken*, 1830, 8 S. 815; *M'Millan* v. *Stewart*, 1815, Hume 924.

[4] *Penney* v. *Aitken*, 1927 S.C. 673.

OATHS (PROMISSORY)

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SECTION 1.—FORMS OF OATHS.

884. The forms of promissory oaths have been laid down by the Promissory Oaths Act, 1868,[1] and these forms, except in special cases hereafter mentioned, are invariably used when the oath is administered. They are as follows :—

SUBSECTION (1).—*Oath of Allegiance.*

885. I, , do swear that I will be faithful and bear true allegiance to His Majesty King George the Fifth, his heirs and successors according to law. So help me God.[2]

SUBSECTION (2).—*Official Oath.*

886. I, , do swear that I will well and truly serve His Majesty King George the Fifth in his office of . So help me God.[3]

SUBSECTION (3).—*Judicial Oath.*

887. I, , do swear that I will well and truly serve our Sovereign Lord King George the Fifth in the office of ; and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will. So help me God.[4]

SECTION 2.—TO WHOM ADMINISTERED.

SUBSECTION (1).—*Oath of Allegiance and Official Oath.*

888. These shall be tendered to and taken by the following officers as soon as may be after their acceptance of office, viz.: the Lord Keeper of the Great Seal, the Lord Keeper of the Privy Seal, the Lord Clerk-Register, the Lord Advocate, the Lord Justice-Clerk. The oath is tendered by the Lord President of the Court of Session at a sitting of the Court.[1]

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[1] 31 & 32 Vict. c. 72.

[2] Secs. 2 and 10.

[3] Secs. 3 and 10.

[4] Secs. 4 and 10.

SUBSECTION (2).—*Oath of Allegiance and Judicial Oath.*

889. These oaths, tendered in accordance with the former custom,[2] are taken by the following, viz.: the Lord Justice-General, the Lord Justice-Clerk, the Judges of the Court of Session, Sheriffs of counties, Justices of the Peace for counties and burghs.[3]

SECTION 3.—AFFIRMATION.

890. A solemn affirmation may be substituted for any oath required by this Act, the words "solemnly, sincerely, and truly declare and affirm," being substituted for the word "swear," and the clause "So help me God" being omitted.[4] If any officer above specified declines or neglects to swear or affirm, he shall be disqualified from, or forced to vacate, his office.[5]

SECTION 4.—ABOLITION OF OATHS IN OTHER CASES.

891. In all cases except where the oath of allegiance is authorised by this Act or the Clerical Subscription Act, 1865, or the Parliamentary Oaths Act, 1866, the oaths of allegiance, supremacy, and abjuration are prohibited, and the oath of assurance in Scotland is abolished.[6] In all other cases, with the exceptions to be hereafter mentioned, a declaration is substituted for the oath formerly in use.

SECTION 5.—EXCEPTIONS.

892. The Act does not affect [7]—

1. Oaths taken under the Clerical Subscription Act, 1865,[8] and the Parliamentary Oaths Act, 1866.[9] In these the form of oaths laid down in the 1868 Act is prescribed.
2. Oaths taken by privy councillors, where the form prescribed by the 1868 Act is also enjoined.
3. Oaths of homage by archbishops and bishops.
4. Oaths of canonical obedience.
5. Oaths taken by peers, baronets, or knights on their creation.
6. Oaths taken in the army, marines, or territorial forces.
7. Oaths taken by aliens on naturalisation, except that the form of the 1868 Act is prescribed.

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[1] 31 & 32 Vict. c. 72, s. 5, and Schedule.
[2] Sec. 6.
[3] Schedule 2.
[4] Sec. 11.
[5] Sec. 7.
[6] Sec. 9.
[7] Sec. 14.
[8] 28 & 29 Vict. c. 122.
[9] 29 & 30 Vict. c. 19.

8. Oaths taken under the Merchant Shipping Act, 1854,[1] by "owners of British ships," except that the new form of oath of allegiance is substituted.

9. The power of substituting a declaration for an oath under the Statutory Declarations Act, 1835.[2]

10. Any oath of attestation authorised by Parliament.

11. Any oath required to be taken by a juror or witness.

SECTION 6.—REGULATION OF VARIOUS PROMISSORY OATHS.

893. The forms and circumstances in which various promissory oaths are administered are regulated by statute, *e.g.* the Coronation Oath,[3] the oath taken by Members of Parliament,[4] privy councillors,[5] archbishops and bishops,[6] soldiers, airmen, marines, and members of the territorial army[7] on enlistment, owners of British ships in certain cases,[8] aliens,[9] expatriated British subjects resuming their British nationality,[10] and justices of the peace as to their estate,[11] on new creation after demise of the Crown,[12] and on renewing a new commission during the same reign.[13]

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[1] 17 & 18 Vict. c. 120, s. 18.

[2] 5 & 6 Will. IV. c. 62.

[3] 1 Will. & Mary, c. 6; 1 Will. & Mary, sess. 2, c. 2; 12 & 13 Will. III. c. 2; 6 Anne, cc. 8 and 11.

[4] 29 Vict. c. 19, and 31 & 32 Vict. c. 72, s. 14 (1).

[5] 31 & 32 Vict. c. 72, s. 14 (2).

[6] 28 & 29 Vict. c. 122, ss. 10-12; 31 & 32 Vict. c. 72, s. 14 (3); 37 & 38 Vict. c. 77, s. 12.

[7] 44 & 45 Vict. c. 58, ss. 80, 101, 179 (7) (12); 7 & 8 Geo. V. c. 51, s. 80; 7 Edw. VII. c. 9, s. 10.

[8] 57 & 58 Vict. c. 6, s. 1 (ii); 31 & 32 Vict. c. 72, s. 14.

[9] 33 & 34 Vict. c. 14, ss. 7, 9; 33 & 34 Vict. c. 102, s. 1.

[10] 33 & 34 Vict. c. 14, ss. 8, 9; 33 & 34 Vict. c. 102, s. 1.

[11] 18 Geo. II. c. 20.

[12] 1 Geo. III. c. 13, s. 1.

[13] 7 Geo. III. c. 9.

OATH TO INVENTORY.

See CONFIRMATION OF EXECUTORS.

OATHS (UNLAWFUL).

See CRIME.

OBLIGATIONS.

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SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*Definition of Obligation.*

894. The word "obligation" means, in the law of Scotland, "a legal tie by which we may be necessitated or constrained to pay or perform something";[1] or, as it is expressed by another of our institutional writers, "a legal tie by which one is bound to pay or perform something to another."[2] These definitions correspond with the well-known analysis of Paulus,[3] and even more closely with the definition in the Institutes: "*Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendæ rei secundum nostræ civitatis jura.*"[4] Each of these definitions postulates a person whose liberty of action is restricted in some manner recognised by law, another in whose favour the restriction is imposed, a fact, act, or event to which the restriction relates, and a process of law whereby the restriction may be enforced. The first person, the one bound, is spoken of as the debtor or granter, the other as the creditor or grantee.

SUBSECTION (2).—*Sources of Obligations.*

895. In the widest sense an obligation may arise in one or other of the following ways: as being voluntarily undertaken, imposed by statute or by a decree of a Court, or from the infringement of rights, arising independently of any of these, which an individual is bound by law to respect. It is at once apparent that two ideas are involved in this statement—the idea of a right and the idea of a duty. An obligation is the sum of the duties and relative rights flowing from the legal relationship originating in any one of the enumerated manners.[1] It has been suggested that it would be more satisfactory to confine the use of the term "obligation" to those instances where the creditor is a specific person, or definite group of persons, and where the counterpart, from the point of view of the creditor, is a right *in personam*, and, on the other hand, to use the word "duty" in reference to the general rights of others, infringement of which constitutes a legal wrong, the corresponding right being a right *in rem*. If, however, the term "obligation" is used to denote the tie by which a person is bound, which it is thought is the accurate use of the word, then it is appropriately used to include both instances, particularly as enforceability in law is an essential feature of an obligation, whereas the word "duty" is not infrequently used in connection with relationships that give rise to claims which, although they have a moral sanction, are not reinforced with the sanction of law.

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[1] Stair, i. 3. 1.
[2] Ersk. iii. 1. 2.
[3] Dig. xliv. 7. 3. pr.
[4] Inst. iii. xiii. pr.

896. Two further observations of a general nature may be made. The first is that the term "obligation" is sometimes, though inaccurately, applied, not to the tie, the *vinculum juris*, but to the document or deed in which it is expressed or by which it is evidenced. An example of this may be found in the Scots statute [2] regulating the forms of authentication of bonds which speaks of "other obligations of great importance," meaning the deeds themselves. A parallel instance is the not uncommon statement that a contract is or has been assigned, when what is meant is the assignation of the rights and liabilities which arise out of the contract. The second observation is that the creditor in an obligation has only a right of action, a *jus ad rem*, whereas the possessor of a real right has a *jus in re*.

SECTION 2.—DIVISION OF OBLIGATIONS.

897. The infinite variety of facts with reference to which a legal relationship between persons may be created renders it difficult, if not impossible, to provide a classification of obligations by means of divisions which are at the same time self-contained and mutually exclusive. It is proposed in what follows to state generally the various divisions, and to deal in detail only with those divisions which appear to be of the greatest practical importance.

SUBSECTION (1).—*Natural, Civil, Mixed.*

898. Stair and Erskine both divide obligations into natural, civil, and mixed. Obligations purely natural are those by which one person is bound to another by the law of nature only. These include, in the view of Stair for example,[1] matters with which, strictly speaking, law has no concern, since they belong properly to the domain of morality. Obligations merely civil are those by which men are bound by positive law only, without any foundation in equity. Mixed obligations are those which are both grounded in equity and have the support of the civil sanction.

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[1] See Dig. xii. 2. 9. 3; Maine, Ancient Law, p. 287.

[2] Act 1579, c. 80.

SUBSECTION (2).—*Pure; Conditional;* In diem.

899. Obligations are further divided by our institutional writers into pure, conditional, and *in diem*. Of the first and third classes it is sufficient to say that a pure obligation is one to which no conditions are attached, which is, accordingly, exigible at any moment the creditor pleases; while an obligation *in diem*, sometimes denominated future, is one in which the tie attaches from the moment the obligation is entered into because the day mentioned must arrive. Conditional obligations call for more elaborate examination.

SECTION 3.—CONDITIONAL OBLIGATIONS.

SUBSECTION (1).—*General.*

900. A conditional obligation is one the efficacy of which depends upon an uncertain future event. It is distinguished from a pure obligation in respect that in the latter the debt is presently due and immediately exigible, and from an obligation *in diem* in that there a proper debt arises from the moment of completing the engagement, although performance is suspended to await the certain event.[2] A stipulation truly conditional operates in suspending not only the performance of the obligation but the obligation itself.[3] All uncertain events are of the nature of conditions, as in the case of provisions payable on marriage or on attainment of a prescribed age.[4] In applying the maxim *dies incertus pro conditione habetur*, it is essential to observe that there must be uncertainty not merely as to when, but also as to whether, the day will arrive. Hence a provision payable at death is a present obligation, fulfilment of which is postponed until an unknown day, which, however, must arrive; whereas one payable at a prescribed age is truly conditional because, although the day is ascertainable, it may never arrive. Conditions may, of course, be either express or implied.

SUBSECTION (2).—*Suspensive and Resolutive Conditions.*

901. In our law conditions are classified also, with reference to the chronological order of material events, as being either suspensive or resolutive—terms which correspond in some measure, although not exactly, with the terms precedent and subsequent used by English lawyers. Speaking generally, it may be said that when by the nature of things one thing or event necessarily precedes another, the contingency is regarded as suspensive of the obligation. The same result follows where by stipulation a certain sequence of events is made a term of the contract. Where, on the other hand, the event in contemplation succeeds in point of time, it is regarded as resolutive; the event terminates the obligation which until that happening had been binding. "The contingency operates either in suspending the debt or in dissolving it. In either case the engagement or obligation is independent of the event. The existence or discharge of the debt rests on it entirely. Under a suspensive condition there is no debt until the event exists (*dies nec cedit nec venit*), and yet the engagement cannot be defeated otherwise than by failure of the condition. When the condition is fulfilled the debt becomes perfect. If the condition be resolutive, the debt at once ceases on the event stipulated." [1]

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[1] i. 3. 4 *et seq.*

[2] Bell's Prin., s. 46; Stair, iii. 1. 46; Ersk. iii. 1. 6.

[3] Ersk., *supra;* Bell's Prin., s. 47.

[4] Ersk. iii. 1. 7.

902. If time be of the essence of the contract, the happening of the event by the appointed day, or the impossibility of it, puts an end to the contingency; while, if time be not annexed, the contract is pendent so long as performance of the condition is possible.[2] Although, however, the obligation may be pendent only, the grantee is so far bound that he cannot withdraw the *spes* which he has created,[3] and, unless the right is strictly personal, it transmits to the heirs of the creditor,[4] and may be made the subject of an assignation.

903. One of the terms of an agreement may be so related to the others that, apart from any question of sequence in time, its fulfilment may be truly a condition of the contract. Such a term may be so material that failure of the party burdened with it to fulfil it frees the other party from his engagement. To such a term the description condition precedent is applied. The case of *Wade* v. *Waldon* [5] affords an example of both elements. The condition there in question was one precedent in time but not in materiality, and was therefore held not to be a condition precedent. As to the meaning of the phrase "condition subsequent" in English law, reference may be made to Anson on Contract.[6]

SUBSECTION (3).—*Possible and Impossible Conditions.*

904. Conditions are either possible or impossible, the latter including such as are illegal or *contra bonos mores*.[7] Our law has followed the civil law in recognising an important distinction between the effect of impossible or illegal conditions adjected to ordinary obligations and contracts, and the effect of like conditions contained in wills and other voluntary provisions. In cases of the former kind the condition annuls the obligation as not being seriously intended or as being self-destructive; in cases of the latter type the condition itself is held *pro non scripto.*[1] The effect to be given, however, to an expressed condition of the former class will depend upon the character of the contingency. If the apparent condition is either necessary or impossible there obviously is no true contingency. In such a case the question whether the obligation is to be considered void, or is to be regarded as pure despite its conditional form, will be answered according as the nominal contingency is positive or negative in character. If the condition is the negative of a necessary event, and therefore is impossible of fulfilment, there is no obligation. If, on the other hand, the condition must necessarily be fulfilled, there is an obligation which is pure.

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[1] Bell's Prin., s. 47; see *Union Insurance Co. of Canton* v. *Wills*, [1916] 1 A.C. 281.

[2] Bell's Prin., s. 50; *Colvin* v. *Short*, 1857, 19 D. 890.

[3] See para. 907, *infra*.

[4] Ersk. iii. 1. 6.

[5] 1909 S.C. 571; *Dawsons, Ltd.* v. *Bonnin*, 1921 S.C. 511; 1922 S.C. (H.L.) 156.

[6] 16th ed., p. 339.

[7] See ILLEGAL AND IMMORAL CONTRACTS, Vol. VIII. p. 19, *ante*.

905. Inability on the part of the debtor to fulfil a condition is, however, no excuse for non-implement. The impossibility must be inherent in the condition itself if performance is to be excused. A party transacting has the opportunity of protecting himself by stipulation against the effect of causes beyond his control, and should he undertake, for example, to complete an executorial contract within a specified time and it turns out to be impossible for him to do so, *sibi imputet.*[2] Similarly an impossible condition will not annul the obligation to which it is attached if the debtor has taken upon himself to warrant the possibility.

SUBSECTION (4).—*Potestative and Casual Conditions.*

906. This is a subdivision of possible conditions. These are either potestative, that is, dependent on an act within the power of the creditor; or casual, that is, dependent on mere accident or on the occurrence of an event beyond the control of the party burdened with the condition.[3] Potestative conditions in settlements are imposed, as a rule, in order to secure performance, and, generally speaking, the condition is held satisfied if the legatee has done his best to fulfil it.[4] The application of this rule must, however, from the nature of things be restricted to a limited class of cases. Outside of deeds testamentary in character, and particularly within the region of contract, it is only to be applied, if at all, in exceptional circumstances. The observations of Lord Watson in *Mackay* v. *Dick & Stevenson*[5] go beyond what is warranted by principle or decision, and circumstances can easily be figured where their application would lead to startling results.

907. Casual conditions are strictly interpreted, and in the general case the occurrence of the event can alone purify them. In casual, and also in potestative conditions, if the party whose interest it is that the event shall not happen impedes or prevents, either by himself or through the agency of another, the performance of the condition, it is held as purified.[1] The performance of a condition is not impeded in the sense of this rule when the impossibility of fulfilment is occasioned merely by the exercise of an independent right, at least when the existence of that right has not been unfairly concealed, or when the right has not been acquired with the intention of defeating the obligation.[2]

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[1] Bell's Prin., s. 49 ; Stair, i. 3. 7, 8 ; Ersk. iii. 3. 84, 85.

[2] As to the form of eventual impossibility designated "frustration," see CONTRACT, Vol. IV. p. 441, *ante.*

[3] Bell's Prin., s. 50 ; Ersk. iii. 3. 85.

[4] Bell's Prin., s. 1785, note (*c*).

[5] 1881, 8 R. (H.L.) 37, at p. 45.

908. Casual conditions which depend upon the voluntary act of a third party must be fulfilled exactly. Where, for example, payment under a policy of insurance against fire was made conditional upon the production of a certificate of character and *bona fides*, the insured was held disentitled to recover without production of the certificate however unreasonably it might be withheld.[3] Further examples of such conditions may be found in cases arising out of executorial contracts, where payments fall to be made upon production of architects' or engineers' certificates during the course of, or on completion of, the work.[4]

SECTION 4.—PARTICULAR SOURCES OF OBLIGATIONS.

909. As has already been observed, obligations may arise in one or other of various ways, and this has led to yet another manner of classification. The division is, in the first place, bipartite, the two main groups being, on the one hand, obligations obediential, or *ex lege*, and on the other hand, obligations conventional, or *ex contractu*.

SECTION 5.—OBEDIENTIAL OBLIGATIONS.

SUBSECTION (1).—*Classification.*

910. Stair regards these as falling into two main groups: (*first*) domestic obligations, (*second*) obligations of restitution, recompense, and reparation. The characteristic common to all the members of these groups is that there is no element of *consensus*, agreement of wills, of debtor and creditor. English writers on jurisprudence make a slightly more elaborated division into domestic, which includes obligations between husband and wife, parent and child, guardian and ward; fiduciary; meritorious, not dissimilar to the principles involved in *negotiorum gestio*; and official, which relates to the right, one *in personam*, which circumstances may create in a member of the community to call upon a public official to exercise his functions.[1] It is unnecessary here to say anything of Stair's first group,[2] but a short examination may be made of the contents of the second.

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[1] *Pirie* v. *Pirie*, 1873, 11 M. 941, at p. 949; *Mackay* v. *Dick & Stevenson*, 1881, 8 R. (H.L.) 37, at p. 40; *Stewart* v. *Kennedy*, 1889, 16 R. 421; 1890, 17 R. (H.L.) 1; *Dowling* v. *Methven, Sons & Co.*, 1921 S.C. 948.

[2] *Philip* v. *The Edinburgh, Perth, and Dundee Rly. Co.*, 1854, 16 D. 1065; revd. 1857, 2 Macq. 514; *Paterson* v. *M'Ewan's Trs.*, 1881, 8 R. 646, per the Lord President at p. 654; *Kedie's Trs.* v. *Stewart & Macdonald*, 1926 S.C. 1019.

[3] *Worsley* v. *Wood*, 1796, 6 T.R. 710; see also *Hollies Stores* v. *Timmis*, [1921] 2 Ch. 202.

[4] *James Howden & Co.* v. *Powell Duffryn Steam Coal Co.*, 1912 S.C. 920; Hudson, Building Contracts, *passim*.

SUBSECTION (2).—*Restitution, Recompense, Reparation.*

911. The obligation of restitution is that by which persons are bound to restore to the true owner all such things as, coming into their power without the desire of the owner and yet without their fault, ought to be restored. This obligation extends to things stolen,[3] straying, found, paid in error, and such like. Even if the possessor has obtained the thing by purchase the owner may, in the ordinary case, have it restored to him.[4] If in such a case the possessor has sold the article and has obtained more than it cost him, he must hand the surplus to the original owner.[5] Whatever is given *ob turpem causam* must be restored if the turpitude was in the receiver, not in the giver. See RESTITUTION; REPETITION.

912. Recompense [6] is the obligation by which one who is made richer by the act of another, without the purpose of donation, is bound to indemnify him either in whole or, at least, to the extent to which he himself is the gainer. This principle applies not only in cases of additions to, or improvements on, property, but also where the benefit arises from services rendered. See RECOMPENSE.

913. The obligation of reparation requires that anyone who commits a wrong shall make good the damage done. The damage suffered may be the result of delict—that is, an act committed with an injurious, fraudulent, or even criminal purpose; or of *quasi*-delict, which may be described as an act of negligence or imprudence not originating in such a purpose as marks delict; or of breach of contract. English law appears to recognise another ground of reparation based upon the law of neighbourhood,[7] but it is at least open to question whether this is recognised in our law as a ground of liability independent of negligence. See NEGLIGENCE ;[8] NUISANCE.[9]

914. In cases of delict and *quasi*-delict, the measure of damages is such loss as is the natural and probable consequence of the act complained of,[10] including in Scotland, in appropriate cases, a sum in name of *solatium*. In cases arising out of breach of contract the damages given are such as may fairly and reasonably be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in contemplation of the parties, at the time when they made the contract, as the probable result of a breach.[1] Where this matter is specifically provided for in the contract, care must be taken to discriminate between clauses which deal with penal, and those which deal with liquidated, damages.[2] See CONTRACT [3] and DAMAGES.[4]

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[1] See Holland, Jurisprudence, ch. xii.

[2] See HUSBAND AND WIFE, Vol. VII. p. 664, *ante*.

[3] Ersk. iii. 1. 10 (with Ivory's Notes); 1 Bell, Com. (M'L. ed.), 299.

[4] *Todd* v. *Armour*, 1882, 9 R. 901; see also *Faulds* v. *Townsend*, 1861, 23 D. 437.

[5] *Faulds* v. *Townsend*, *supra*.

[6] Stair, i. 7. 9.

[7] *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330.

[8] P. 241, *ante*.

[9] P. 340, *ante*.

[10] *Weld-Blundell* v. *Stephen*, [1920] A.C. 956.

SECTION 6.—CONVENTIONAL OBLIGATIONS.

SUBSECTION (1).—*Definition.*

915. A conventional obligation is one, founded on consent, by which the debtor is bound to give, do, or refrain from doing something. It confers on him in whose favour the obligation is undertaken a right to exact compliance. Three acts of the will precedent to such an obligation have been distinguished—desire, resolution, engagement; but it is of the last of these only that the law takes cognisance. The consent upon which an engagement proceeds must be real, a requirement which excludes the presence of, on the one hand, incapacity, which may arise, for example, from disease or imbecility, and on the other hand, fraud or force and fear.

SUBSECTION (2).—*Classification.*

916. Conventional obligations may be divided into (*a*) those in which the debtor enters into an engagement without any corresponding stipulation imposed upon the creditor—unilateral obligations; (*b*) those in which there are mutual stipulations, each party being at once both debtor and creditor—contracts, which in order to distinguish the requisites of final and conclusive engagement in different situations are classified as consensual, real, and written. The relations which subsist, when there is a plurality either of creditors or of debtors, between the creditors on the one hand and the debtors on the other hand, and also between the creditors or the debtors *inter se*, provide a further basis for differentiation; while yet another ground of distinction is that between obligations which are principal or primary, and those which are accessory.

SUBSECTION (3).—*Consideration.*

917. Conventional obligations spring from a cause or motive of one kind or another. In its widest sense consideration denotes the reason for coming under an obligation. The obligation may be gratuitous, as when it is said to be undertaken for the "love, favour, and affection" borne by the granter towards the grantee; or it may be onerous, as in the case of a contract with mutual stipulations. Onerosity does not mean that the consideration must be adequate—a fact as to which the law does not concern itself, since the consideration may be determined by circumstances independent of the extrinsic value of the subject-matter. Where, however, the binding force of a contract is impugned, inadequacy of consideration, viewed along with other circumstances, may afford evidence of fraud or circumvention. In the sense in which the term is used in law a valuable consideration "may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."[1] For a detailed examination of the doctrine of consideration, reference should be made to the authorities on English law, in which the subject is of greater importance than in our law.

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[1] *Hadley* v. *Baxendale*, 1854, 9 Ex. 341.

[2] *Forrest* v. *Barr & Henderson*, 1869, 8 M. 187; *Castaneda* v. *Clydebank Shipbuilding Co.*, 1904, 7 F. (H.L.) 77.

[3] Vol. IV. p. 441, *ante*.

[4] Vol. V. p. 385, *ante*.

SUBSECTION (4).—*Unilateral Obligations.*

918. Although obligations are binding if an engagement be proved by such evidence as the law requires in the particular case without the necessity of shewing that they proceed upon valuable consideration, yet the presence or absence of consideration has certain important consequences. Obligations which are gratuitous, though effectual against the granter and his heirs, are, by statute,[2] liable to be cut down at the suit of a prior creditor if the granter is already insolvent and the grantee is a near relation or confidant. Again, in questions of relief, payment made under a moral obligation only, or when there was no legal obligation to pay, will not support a claim. In other words, onerosity, in the law of Scotland, involves something more than a mere obligation in morality.[3]

919. A promise is a unilateral obligation acceptance of which is presumed, in which respect it differs from an offer. The obligation is created at once, free from any condition of acceptance, whereas an offer is always and *in terminis* conditional, raised into an obligation only by an acceptance which exactly meets it. A promise may, however, be either absolute or conditional. Although acceptance is not necessary to the constitution of an obligation by promise, yet the obligation may be discharged with the consent of the grantee, by rejection, express or implied, or, if it is conditional, by failure of the condition. It may be proved by writing or by oath, and possibly, where it relates to moveables, or has been followed by *rei interventus*, by witnesses,[4] except in matters of cautionry. The qualification as to limitation of proof suggested here has the support of Professor Bell, but appears to have been doubted by Lord Kyllachy.[5] Money obligations are required to be in writing, the essential part of which is the personal obligation to pay. The writ may be either a formal bond or a simple engagement to pay the sum mentioned as in a promissory note. Alimentary provisions are common examples of unilateral obligations. So far as concerns the granter and his creditors, they are subject to the same rules as other obligations, but the rights conferred upon the grantee are special. See ALIMENT.[1]

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[1] *Currie* v. *Misa*, 1875, L.R. 10 Ex. 153, at p. 162.

[2] Act 1621, c. 18.

[3] *Henderson* v. *Paul*, 1867, 5 M. 628; *Gardiner* v. *Main*, 1894, 22 R. 100; *Clarke* v. *Scott*, 1896, 23 R. 442.

[4] Bell's Prin., s. 8.

[5] *Hawick Heritable Investment Bank, Ltd.* v. *Huggan*, 1902, 5 F. 75, at p. 78.

SUBSECTION (5).—*Contracts.*

920. A contract is an agreement of two or more persons by which something is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part. By agreement is meant the intention, expressed and communicated, of two or more persons to do something which will affect their legal relations. The essential condition is *consensus in idem placitum.* By this is not meant, however, that both parties in their inmost hearts are thinking of precisely the same thing, but that what they say or, in the case of implied agreement, what they do leads, in the opinion of a reasonable and unbiassed person, to the conclusion that they were in agreement.[2] The reports of cases litigated in the Courts afford many instances in which the parties honestly and genuinely differed as to the nature or incidents of contracts, but where, nevertheless, agreement has been found proved, because it was a reasonable conclusion on the part of each deduced from the words, or actings, of the other. For one to persuade a judge that his meaning and intention was different from that which the other contracting party understood it to be, is of no avail if what has been said or done has induced the latter, acting reasonably, to proceed upon a footing other than the one alleged.

921. On the other hand, it is essential that there shall not be real error in substantial matters, since that destroys the possibility of true consent. Such error may relate to the person, to the subject-matter, or to the nature of the contract. Similarly, true consent is excluded where apparent consent has been procured by force and fear, that is, such constraint as will overmaster a mind of ordinary vigour, or by fraud inducing the contract and misleading the other party as to its true nature and substance.

922. A further condition relating to consent is that it shall be voluntary, that is, given by persons who are, in the eyes of the law, capable of *voluntas.* This requirement excludes the possibility of pupils, imbeciles, and persons in a state of absolute drunkenness entering into a contract. Where a person is domiciled in the country where the contract is executed, his capacity to contract will be regulated by the law of that country, and the validity, or otherwise, of the contract determined accordingly.[3]

SUBSECTION (6).—*Consensual, Real, Written.*

923. This division is adopted by our institutional writers, but it is at least questionable whether the distinction between consensual and, so called, real contracts is a sound one. A consensual contract is one which is completed by the use of binding words proved, as the case may be, either by writing or by witnesses. Every obligation to which writing is not essential is effectual where consent is proved. Examples of this type of contract are mandate, location, sale.

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[1] Vol. I. p. 287, *ante.*

[2] *Muirhead* v. *Turnbull & Dickson*, 1905, 7 F. 686.

[3] *Cooper* v. *Cooper*, 1888, 15 R. (H.L.) 21.

924. For the completion of a real contract, on the other hand, it is said that an act either of delivery or payment or performance requires to take place, and that without the appropriate act no real contract can be completed. This, however, appears to involve the confusion of two distinct things. The reciprocal rights and duties of lender and borrower, or of depositor and depositary, for example, do not arise from tradition of the thing which is the subject-matter of the contract, but from the agreement of the parties. It is true that in some cases delivery is essential to the creation of a real right, as in pledge, but in other cases, such as maritime hypothec, and lien, it is not so. In every case, however, the obligations of the parties arise *consensu*. The contracts generally described as real are loan, commodate, pledge, and deposit.

925. Written contracts are those which require authentic written evidence, not merely in proof of agreement, but in solemnity. Such obligations may be constituted by attested, by holograph, or by privileged writings. Speaking generally, deeds must, in order to be effectual, be delivered. Exceptions to the rule are testaments, deeds the delivery of which is expressly dispensed with, or those of which the granter is also the natural custodier, and mutual contracts, which become binding by the subscription of all the parties.

Subsection (7).—*Principal and Accessory Obligations.*

926. This classification may be founded either upon the nature of the things which are the objects of the obligation, or upon the persons contracting. An example of the first group is found in the obligation resting upon the vendor of an estate to use good faith and a proper care of the thing sold. That obligation is accessory, since it is in a manner the consequence of the principal obligation of sale. An example of the second group is found in the contract of a cautioner who obliges himself for another and adopts that person's obligation, so that the obligation of the surety is accessory to the principal obligation, that of the principal debtor. The institutional writers in Scotland have not observed the distinction above suggested, but intend by the term "accessory" to denote obligations which do not subsist of themselves, but are accessories to or make part of prior obligations.[1] The chief instances given are cautionary obligations, obligations to pay interest, and bonds of corroboration. The term "accessory" is now, however, generally restricted to cautionary obligations and others of a cognate character, while the other instances given would now be classified as primary.[2]

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[1] Ersk. iii. 3. 60; see also Bell, Com. (7th ed.), i. 402, note (8).

[2] See *Milne* v. *Kidd*, 1869, 8 M. 250.

SUBSECTION (8).—*Joint and Several Obligations.*

927. Where two or more parties are conjoined either as creditors or as debtors, the obligation is obviously susceptible of more than one construction. Where two or more are bound as debtors, for example, the creditor may have the right to exact the whole debt from any one of the co-obligants, or he may be entitled to exact from each no more than the proportional share. Similarly, where there are two or more creditors the right of each may be to exact the whole, or it may be to exact only his proportional share. In the one case the liabilities and rights are said to be *in solidum*, in the other *pro rata.*

928. In such a matter as this it is well-nigh impossible to lay down a rule of universal application, but it may be said with safety that the presumption is that obligations affecting two or more, whether as debtors or as creditors, are to be construed as imposing, or conferring, as the case may be, *pro rata* liabilities or rights. This presumption yields to expressions shewing a contrary intention, as, for example, when parties are bound "conjunctly and severally," or as "principals and full debtors." Further, there are circumstances which exclude the presumption, as, for example, the fact of partnership,[1] or where the obligation is in its nature indivisible, and this is so even where the claim has, on account of non-performance, resolved into a claim for damages.[2] As to the meaning of "jointly" or "conjunctly," see the case cited.[3]

929. In joint obligations extinction takes place upon payment or performance or its equivalent by all; in conjunct and several obligations satisfaction by one operates a discharge to all. Confusion does not extinguish the debt, but acceptilation does, since it discharges the object of the obligation. In joint obligations where one debtor has paid more than his share he is entitled to *pro rata* relief from each of his co-obligants without any stipulation to that effect, and without the necessity of an assignation from the creditor. It has been held, however, that where the debtor paying has obtained an assignation from the creditor, he is entitled to enforce payment of the full amount of the debt, under deduction of his own share, from any one of his co-obligants.[4] There is no right of relief between co-delinquents,[5] but where a joint-and-several decree has been enforced against one of several co-delinquents, the one paying is entitled to relief, since the original obligation has been extinguished by novation.[6]

SECTION 7.—IMPERFECT OBLIGATIONS.

930. This phrase suggests a contradiction in terms, but it is commonly used to describe the position where an agreement is either denied or given obligatory effect against the will of one of the parties, or is expressed in terms which leave performance within the option of the debtor. Examples of the first type are to be found in cases where an agreement is proved, or it may even be admitted, but cannot be enforced on account of failure to comply with some requisite of the law, so that until the defect is made good either of the parties may resile. Examples of the second type are those cases where there is no completed agreement, but one party permits the other to proceed as if there were. In such cases the law sets up the agreement and completes the obligation by the equitable plea based upon *rei interventus.* The third type is illustrated by an obligation which is in truth conditional, as where one undertakes to pay or do something when it is convenient or when he is able,[1] so that the characteristic of enforceability is in effect absent.

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[1] 53 & 54 Vict. c. 39, s. 9.

[2] *Darlington* v. *Gray*, 1836, 15 S. 197.

[3] *Coats* v. *The Union Bank of Scotland*, 1928 S.C. 711.

[4] *Kincaid* v. *Leckie*, 1665, Mor. 14640; *Smeiton* v. *Laird of Kinnymond*, 1684, Mor. 14641.

[5] *Western Bank* v. *Bairds*, 1862, 24 D. 859.

[6] *Wick and Pultneytown S.S. Co.* v. *Palmer*, 1894, 21 R. (H.L.) 39.

SECTION 8.—EXTINCTION AND DISCHARGE OF OBLIGATIONS.

SUBSECTION (1).—*Performance.*

931. An obligation is extinguished by performance, usually the performance of an act or the delivery of a thing on the one side, and the payment of the price on the other. The performance must be substantial, and not a mere compliance with the letter of the obligation. If it take the form of a payment of money, it must be an effectual payment to the proper party. If no time is fixed, the obligation must be performed within reasonable time, and if one party is guilty of undue delay, a notice by the other party that the contract must be completed within a specified time will be treated as effectual.[2]

932. When performance depends upon the concurrence or collaboration of the creditor, it is excused if he himself occasions non-performance. "The party who is to do the act must shew that he was ready and willing to do it; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act." [3] The same holds good if one party disables himself from performing his part.[4]

SUBSECTION (2).—*Consent.*

933. Parties may agree to waive performance of an obligation. "As consent constituteth, so contrary consent distributeth or extinguisheth any obligation, whether it be by declaration, renunciation, or discharge, or *per pactum de non petendo*, which may be extended not only to conventional, but to natural obligations, as to any duty omitted or transgressed which is passed, though not to the discharge of any obligation itself as to the future." [5]

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[1] See *Stark's Trs.* v. *Mitchell* (O.H.), 1923, S.L.T. 326; *Wylie* v. *Carlyon*, [1922] 1 Ch. 51.

[2] *Great Northern Rly. Co.* v. *Harrison*, 1852, 22 L.J. C.P. 49.

[3] *Jones* v. *Barkley*, 1781, 2 Doug. 684, per Lord Mansfield at p. 696.

[4] *Ross* v. *M'Farlane*, 1894, 21 R. 396.

[5] Stair, i. 18. 1.

Subsection (3).—*Ex lege.*

934. All obligations for personal service are discharged by death. Others are extinguished, or, what is often in effect the same, the mode of proof is restricted, by operation of prescription (*q.v.*).

Subsection (4).—*Novation.*

935. Novation is the extinction of one obligation by the substitution for it of another, the debtor and creditor remaining unchanged. Novation is not to be presumed; indeed the presumption of law is against it. The acceptance of a new security without the former one being discharged does not operate as novation, because in order to novation the original debt must be extinguished.[1] There is a statutory provision which, in the case of a transfer of the business of one insurance company to another, prevents novation, unless the abandonment of a policy-holder's claim on the old company and his acceptance of the liability of the new company in lieu thereof is signified in writing.[2]

Subsection (5).—*Delegation.*

936. It has been observed[3] that delegation is nowhere more accurately defined than by Erskine,[4] who says: "Delegation, which may be accounted a species of novation, is the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged; *e.g.* if the debtor in a bond should substitute a third person who becomes obliged in his place to the creditor, and who in the Roman law is called *expromissor*, this requires not only the consent of the *expromissor* who is to undertake the debt, but of the creditor." The nature and extent of the obligation remains as before; it is only a change in the person of the obligant which occurs. It is accordingly essential that the intention of the creditor to discharge the first debtor and to accept the second in his stead should be clearly expressed. Delegation, like novation, is not to be presumed; indeed there is a strong presumption against it.[5] Whether delegation has been effected is a question of fact and intention dependent for its solution upon the circumstances of each case, but it may safely be said that without satisfactory proof of the consent of the three parties interested, viz. the original debtor, the new debtor, and the creditor accepting the latter and discharging the former, delegation will not be held to have been effected.

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[1] *Pattie* v. *Thomson*, 1843, 6 D. 350; *Hay & Kyd* v. *Powrie*, 1886, 13 R. 777, per Lord Rutherfurd Clark.

[2] 35 & 36 Vict. c. 41, s. 7.

[3] *M'Intosh & Son* v. *Ainslie*, 1872, 10 M. 304.

[4] iii. 4. 22.

[5] Per Lord Pres. Inglis in *M'Intosh & Son* v. *Ainslie, supra*.

SUBSECTION (6).—*Acceptilation.*

937. This is a mode recognised in the law of Scotland of extinguishing an obligation by the acceptance of something merely imaginary in payment of the debt, or satisfaction of the obligation. It may also be effected by a declaration that, contrary to the fact, the debt has been paid or the obligation performed. The term also covers satisfaction upon grounds equivalent to payment or performance. An obligation constituted verbally may usually be extinguished by a verbal declaration of satisfaction, but writ or oath is usually necessary to prove renunciation of a debt of over £100 Scots, though not constituted by writing, unless the transaction is for ready money. If the obligation be constituted by writing (except bills and promissory notes [1]), the proof of satisfaction must be by the writ or oath of the creditor.

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[1] 45 & 46 Vict. c. 61, s. 100.

OBSCENE WORKS AND PICTURES.

See CRIME.

OCCUPATIO.

See PROPERTY.

OFFENCE.

See CRIME.

OFFENSIVE TRADES.

See NUISANCE; PUBLIC HEALTH.

OFFER AND ACCEPTANCE.

See AUCTION; CONTRACT; OBLIGATIONS.

OFFICE.

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SECTION 1.—GENERAL CHARACTERISTICS.

938. Office has been defined as "a right to exercise a public or private appointment and to take the fees and emoluments which belong to it."[1] An officer has a certain discretion in the performance of his duties, which distinguishes his position alike from that of the holder of a mere honour or dignity, who has no duty to perform, and from that of a servant, whose primary duty is to obey his master. It has been stated that the appointment is a form of mandate, whence the consequences follow, that the office is forfeited if the holder is guilty of serious but not of trifling fault;[2] that, in the case of personal office, the doctrine of *delectus personæ* generally applies;[3] that, unless in exceptional circumstances, the office, or the performance of its duties, cannot be delegated;[4] and that the maxim *officium nemini debet esse damnosum* is upheld.[5] In modern practice the position of an officer is regarded as akin to that of an agent[6] and, for some purposes, to that of a trustee.[7]

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[1] Bell, Com. i. 124.

[2] Stair, i. 12, 16.

[3] Stair, i. 12, 6.

[4] Stair, i. 12, 7.

[5] Ersk. Inst. iii. 3, 38.

[6] See paras. 967–972, *infra*—Liability.

[7] See para. 976, *infra*; para. 990, *infra*—Corruption in Office.

939. As regards servants of the Crown, the law to be applied is that branch of public law which concerns the exercise of the royal prerogative, and the application of the doctrine of public policy, in their relations to the Crown and to the public. For this reason, with the exception of certain minor differences, referable chiefly to peculiarities of the law of procedure, of diligence, and of bankruptcy, the law, in any event since the Union of 1707, is the same in Scotland as in England.[1] The prerogatives of the Crown of Scotland, as also those of the Crown of England, now belong to the Crown of Great Britain,[2] and in at least one instance a prerogative of the Crown of England has been recognised in Scotland.[3] It has been doubted whether the prerogative of the Crown of England can be used to invade the rights of the subject in Scotland,[4] but, as it cannot be so used in England, the question is unlikely to arise. The principles of public policy are necessarily the same in both countries.

940. As regards public officers other than servants of the Crown, the law to be applied is the common law of agency as affecting the relations of officers of local authorities and of other public corporations with their principals and the public. This is substantially the same in both countries. In this case the prerogative is of no application, and although considerations of public policy cannot be entirely ignored, they are of minor importance. The law of private office can only be considered in detail with reference to particular branches of private law, such as the law of trusts, of banking, or of companies.

SECTION 2.—CLASSIFICATION OF OFFICES.

941. All public office is derived from the Crown, either immediately by direct grant, or mediately through some subordinate authority, and is created either by the royal prerogative, or, now generally, by Act of Parliament. Public offices vary widely in their nature and duties, but may conveniently be classified according as they are (1) heritable or personal, (2) ancient or new, (3) central or local, (4) judicial or ministerial, and (5) civil or military.

SUBSECTION (1).—*Heritable or Personal.*

942. Heritable office is now uncommon. Formerly the most important heritable offices were those of the King's household. With the exception of the Coronation offices and a few others, these are no longer heritable, but are treated as political, it being the practice for the officers to retire with a change of Ministry. An exception is recognised in the case of certain offices, more particularly the Coronation offices, which are only called out of abeyance on the occasion of a Coronation. These are still heritable, and the long prescription, both positive and negative, applies to them. To establish a title by prescription proof of exercise on consecutive occasions covering the prescriptive period is sufficient.[1] Generally heritable offices, unlike personal offices, may be sold, adjudged subfeued, or deputed,[2] and these privileges are not struck at by the Sale of Offices Act, 1809.[3] Certain offices, however, descend strictly *jure sanguinis* and are not *in commercio*.[1] Heritable judicial office was abolished by the Heritable Jurisdiction Act, 1747.[4]

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[1] Cf. *Macgregor* v. *Lord Advocate,* 1921 S.C. 847, per Lord Justice-Clerk at p. 851.

[2] *Advocate-General* v. *Mags. of Inverness,* 1856, 18 D. 366, per Lord Curriehill at p. 372.

[3] See para. 963, *infra.*

[4] *Lord Advocate and Barbour* v. *Lang,* 1866, 5 M. 84, per Lord Deas at p. 92.

SUBSECTION (2).—*Ancient or New.*

943. Ancient offices are generally the creation of the prerogative, and their attributes are determined by the ancient usages of the realm [5] or, where it is extant, by the express terms of the grant. Since 1455 it has been illegal to create new heritable offices in Scotland, the Act 1455, c. 44, providing that "there be na office in time to cum given in fee or heritage." The Crown may still use the prerogative to create new personal offices subject to certain restrictions. Thus it may not create a new office which is inconsistent with the Constitution or prejudicial to the lieges; [6] nor one with new fees annexed to it; nor can it annex new fees to an ancient office, since this would be in effect to impose taxation without the authority of Parliament.[7] In practice new offices are almost invariably created by statute.

SUBSECTION (3).—*Central or Local.*

944. Offices of the central government include (*a*) offices held under some order, warrant, or commission directly from the Crown. Of these the most important are the offices of the armed forces of the Crown, the offices of the judges of the Supreme Court, who exercise the royal prerogative of justice, and the offices of the heads of the Departments of State, who exercise the prerogative in its ministerial aspect. The latter are generally also political. Their holders are members of the Ministry and of the Legislature, with or without a seat in the Cabinet, and resign office on the fall of the Ministry of which they are members. In the case of a few of the minor Departments the offices are non-political, their holders being merely members of the civil service; (*b*) offices of the civil service whose holders act, not under a commission from the Crown, but under an engagement of service made, on behalf of the Crown, by the head of the Department in which they are employed.

945. Local offices include (*a*) certain offices, such as those of the Lord Lieutenant, of the Sheriff, and of the Justices of the Peace of a county, which are held directly from the Crown under a commission in some form, and are also at the same time offices of the central government; (*b*) offices under the locally elected councils, such as the county and town councils, which conduct the work of local government. Such offices are held under an engagement of service, made not with the Crown but with the local authority; (*c*) offices under certain public corporations, which may be either public utility undertakings, such as the railways, or educational or charitable trusts, such as the universities and hospitals. Although local office is thus generally held under a local authority or other public corporation, it is, like central office, derived from the Crown either immediately, as in the case of the offices of Lord Lieutenant or Sheriff, or mediately, through some charter or statute for which the consent of the Crown is necessary. Accordingly the Crown retains a certain right of supervision and control over local offices which may be either statutory and exercised by means of inspection, audit of accounts, orders and regulations or otherwise, or implied at common law.[1]

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[1] *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237, per Lord President at p. 1255; 1910 S.C. (H.L.) 35.

[2] Bell, Com. i. 125; *Cockburn* v. *Langton's Crs.*, 1747, Mor. 150, 157; 1755, 1 Pat. 603; *Gardner* v. *Grant*, 1835, 13 S. 664.

[3] 49 Geo. III. c. 126, ss. 9, 10, 11.

[4] 20 Geo. II. c. 43.

[5] *Hill* v. *R.*, 1852, 8 Moo. P.C.C. 138.

[6] Coke, Inst. ii. 540.

[7] Coke, Inst. ii. 553; Chitty on the Prerogative, p. 80.

SUBSECTION (4).—*Judicial or Ministerial.*

946. Judicial office is concerned with the exercise of the royal prerogative of justice in the courts of law. The King is the fountain of justice, not in the sense that he is himself the author of justice, but that he is its distributor, and the steward of the public for that purpose.[2] The jurisdiction of all courts of law is derived either immediately or mediately from the Crown, proceedings are taken in the King's name, and judicial decrees pass under his seal and are executed by his officers. All judicial officers, including, apparently, burgh magistrates when acting judicially,[3] are servants of the Crown.

947. Ministerial office is largely concerned with the exercise of the royal prerogative in its administrative aspect, and ministerial officers are generally servants of the Crown. Ministerial officers are occasionally called upon to exercise quasi-judicial functions, in respect of which they are allowed a qualified judicial privilege. Apart from their functions, the distinction between judicial and ministerial office is of importance chiefly with reference to questions of tenure [4] and of privilege.[5]

SUBSECTION (5).—*Civil or Military.*

948. Military office is held under a commission issued either directly by the Crown or, as in the case of naval officers, through the Admiralty, and military officers, including officers of the Navy and Air Force, are servants of the Crown [6] and at common law are in the same position as civil officers. Like civil officers, they do not, by reason of their office, divest themselves of the rights and liabilities of ordinary individuals. They remain subject to the ordinary law of the land, both civil and criminal, and to the jurisdiction of the ordinary courts of law.[1] In the event of a conflict of jurisdiction between a civil and a military court the jurisdiction of the civil court will prevail.[2] This general principle is subject to two material limitations. First, in matters which only concern the military position and character of an officer a civil court will usually decline to interfere with the jurisdiction of a military court. The internal affairs of the armed forces of the Crown are governed by various special statutes, articles, and regulations forming a code of military law which are intended to promote the efficiency of the services and provide for the proper redress of grievances, and on entering the service an officer is deemed to have voluntarily accepted their provisions.[3] Secondly, it is necessary, in the interests of efficiency, that an officer should be protected in the performance of his duties from unnecessary claims at law on the part of the public or of his subordinates. Accordingly an officer is not liable to a member of the public for a wrong done to him in the discharge of his duty, where the act has been done in obedience to the command of, or has been afterwards ratified by, a superior.[4] Similarly an officer is not liable to his subordinate for any act done in discharge of his duty, even if he has acted maliciously and without probable cause.[5] In so far as the position of military officers is modified in detail by statute it is considered elsewhere.[6]

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[1] Cf. *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905.

[2] *Cf.* Stephen's Commentaries on the Laws of England, 17th ed., vol. i. p. 196.

[3] *Mags. of Edinburgh* v. *Surveyor of Taxes*, 1889, 17 R. 93.

[4] See paras. 953–958, *infra*.

[5] See paras. 959–966, *infra*.

[6] *National Bank of Scotland, Ltd.* v. *Shaw*, 1913 S.C. 133; cf. *Mags. of Helensburgh* v. *Brock*, 1905, 13 S.L.T. 98.

Section 3.—Classification of Officers.

949. It has been stated that "every one who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer." [7] Public officers cannot be enumerated in any detail. In general terms they comprise members of the Legislature, of the Judiciary, and of the Executive, including the Civil Service; officers of the Navy, the Army, and the Air Force; office-bearers of the established Church, of County and Town Councils, of the Universities and Hospitals, and of all other public corporations. Legislative [8] and ecclesiastical [9] officers occupy a special position which is considered elsewhere. The distinction between servants of the Crown and other public officers is fundamental.

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[1] *Reg.* v. *Pinney*, 1832, 5 C. & P. 254; cf. *Smith* v. *Lord Advocate*, 1897, 25 R. 112, per Lord Trayner at p. 123; *Mackie* v. *Lord Advocate*, 1897, 25 R. 769.

[2] *Cf.* Army Act, 1881 (44 & 45 Vict. c. 58), ss. 41, 144, 162.

[3] *Dawkins* v. *Lord Rokeby*, 1875, L.R. 7 H.L. 744.

[4] *Buron* v. *Denman*, 1848, 2 Ex. 167; cf. *Wilson* v. 1*st Edinburgh R.G.A. Volunteers*, 1904, 7 F. 168.

[5] *Sutton* v. *Johnstone*, 1786, 1 T.R. 493.

[6] See ARMED FORCES OF THE CROWN, Vol. I. p. 481, *ante*.

[7] *Henly* v. *Mayor of Lyme*, 1828, 5 Bing. 91, per Best C.J. at p. 98.

[8] See PARLIAMENT.

[9] See CHURCH, Vol. III. p. 314, *ante*.

SUBSECTION (1).—*Servants of the Crown.*

950. The servants of the Crown conduct the executive government of the country. The King is himself the chief officer of the realm and all acts of government are done in his name. The King, however, may not act in person, and in practice his executive powers, whether judicial or ministerial, are delegated and performed by his servants. The servants of the Crown include all officers of the central government and in addition certain local officers, such as the Lord Lieutenant, the Sheriff, and the Justices of the Peace of a county, who represent the central government in the county. The royal prerogative as exercised by the servants of the Crown is the foundation of the executive government. In the case of the judges of the Supreme Court and of the ministers of the Crown, who represent the Crown immediately and are responsible for the conduct of their Departments of State, this is exercised directly, and, in relation to the public, is substantially that of the Crown itself. In the case of inferior servants of the Crown the extent to which the prerogative may be exercised varies with the circumstances and the nature of their office. Their engagement of service is made not with the head of their Department but, through him, with the Crown itself, and although it is binding upon them, it is not binding upon the Crown, nor upon the head of their Department, with whom they have no contractual relationship, he being, like them, a servant of the Crown.

SUBSECTION (2).—*Other Public Officers.*

951. Other public officers include all persons holding office under the public authorities who perform the work of local government, or under other corporations who perform public services of some kind. They exercise none of the prerogatives nor privileges of the Crown. Except in so far as it is modified by charter or by statute, their relationship to the authority in whose service they are is in the full sense contractual, and their position is substantially that of an agent of their employer.

952. Although the distinction between servants of the Crown and other public officers is in law thus clearly defined, uncertainty may arise with reference to the position of officers who act under the dual control of the central and of a local authority, such as police officers, medical officers of health, and local inspectors. It would appear that such officers may for certain purposes be regarded as servants of the Crown, and for others, as officers of the local authority. Thus, with reference to the question of the exemption from rates of property occupied for police purposes and for the local administration of justice, it has been observed that "it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which, by the Constitution of this country, fall within the province of government and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu.*"[1] Each case can only be determined upon the particular facts. It appears, however, to be well established that the police are, for most if not for all purposes, servants of the Crown,[2] although it may be noted that it has been held that their pay has not the privilege, allowed to that of other servants of the Crown, of exemption from arrestment.[3] The opinion has been expressed that a sanitary inspector appointed by the magistrates of a burgh is not a servant of the Crown.[4] The position of any particular officer as a servant of the Crown or of a local authority is of more particular importance with reference to the question, considered elsewhere,[5] of the liability, as principal, of the local authority for his wrongful acts. As principal, the Crown incurs no liability for the acts of its servants.

SECTION 4.—TENURE OF OFFICE.

SUBSECTION (1).—*Judicial Officers.*

953. In order to preserve the independence and impartiality of judges the tenure of office of all judicial officers, with the exception of burgh magistrates and of Justices of the Peace, is *ad vitam aut culpam.*[6] In the case of the judges of the Court of Session there is no statutory authority for the rule, although it was expressly affirmed by a resolution of the Convention of Estates of 1689,[7] nor is there any statutory provision for their removal. The opinion has been expressed that power to remove resides in Parliament or in the King in Council.[8] In the Sheriff Court the Sheriff Principal and the Sheriff-Substitute may be removed for *culpa* by the Secretary of State for Scotland on a report prepared at his instance by the Lord President of the Court of Session and the Lord Justice-Clerk. In the case of the Sheriff Principal it is necessary that the report should first lie before both Houses of Parliament for a period of four consecutive weeks while Parliament is sitting.[9] The tenure of a stipendiary magistrate is the same as that of a Sheriff-Substitute.[10] Normally burgh magistrates hold office from the date of their election to the date at which they fall to retire in ordinary course. Before the end of that period they may be removed in respect of certain disqualifications.[11] Justices of the Peace hold office during the pleasure of the Crown. They may be removed either directly by warrant under the Great Seal or indirectly by the omission of their names from a new commission.

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[1] *Mersey Docks* v. *Cameron*, 1864, 11 H.L.C. 443, per Blackburn J. at p. 464 ; cf. *Mags. of Edinburgh* v. *Surveyor of Taxes*, 1889, 17 R. 73 ; *Parish Council of Edinburgh* v. *Mags. of Edinburgh*, 1907 S.C. 1079.

[2] *Brown* v. *Mags. of Edinburgh*, 1907 S.C. 256 ; *Adamson* v. *Martin*, 1916 S.C. 319 ; *Simpson* v. *Dundee Corporation*, 1928 S.N. 30.

[3] *Young* v. *Turnbull*, 1928 S.N. 46.

[4] *Neilson* v. *Mags. of Falkirk*, 1899, 2 F. 118, per Lord Kinnear at p. 126.

[5] See para. 972, *infra*.

[6] Ersk. i. 2, 32.

[7] c. 13.

[8] *Hagart's Trs.* v. *Hope*, 1821, 1 S. 46.

[9] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 13.

[10] Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 455 (3).

[11] Town Councils (Scotland) Act, 1900 (63 & 64 Vict. c. 49), ss. 12–14.

SUBSECTION (2).—*Servants of the Crown.*

954. Servants of the Crown, other than judicial officers, hold office only during the pleasure of the Crown. In practice, ministers of the Crown resign office on the fall of the government of which they are members. All other servants of the Crown may be dismissed at any time without cause assigned and with no right of action for wrongful dismissal.[1] Their engagement of service with the Crown is in fact an imperfect obligation lacking the *vinculum juris*, and their only remedy is an appeal of an official or a political nature.[2] They are, however, themselves bound by the terms of their engagement. They have no contractual relationship with the head of the Department in which they are employed and therefore no remedy against him.[3] The rule is one of public policy and can only be elided by express stipulation.[4] If, however, the stipulation is contrary to public policy it will not be given effect.[5] In all British possessions the position of servants of the Crown is the same.[6] In practice, it may be noted, the rule is considerably modified. In the civil service it is the universal custom to submit persons, who have been successful in the competitive examinations for admission to the service, to a period of probation, on the expiry of which the appointment is in practice treated as permanent, subject to continued good behaviour.[7]

SUBSECTION (3).—*Other Public Officers.*

955. The tenure of other public officers is generally regulated by the terms of their appointment. Frequently there is statutory provision for the purpose. Thus the tenure of officers of county councils [8] and of burghs [9] is mainly statutory. In the absence of express provision the tenure is determined by established practice. Generally it is *ad vitam aut culpam*,[10] but occasionally the practice is that it should be during pleasure only.[11] The law has been thus stated: "either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied." [12]

956. Regarding the degree of *culpa* necessary to justify the dismissal of an officer holding office *ad vitam aut culpam* it has been observed that moral blame is not essential, but that dismissal is justified if the officer has wilfully or through gross negligence conducted himself in a manner inconsistent with the public service required of him.[1] An officer holding office *ad vitam aut culpam* can only be dismissed by process of law. The authority which has appointed him may, however, pass a resolution that he has forfeited his right to office and should be dismissed.[2] Pending the initiation of litigation for this purpose the Court, by the *nobile officium*, may in the public interest appoint an officer *ad interim*,[3] but once proceedings have commenced it will generally decline to do so.[4]

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[1] *Dunn* v. *Reg.*, [1896] 1 Q.B. 116; *Shenton* v. *Smith*, [1895] A.C. 229.

[2] *Gibson* v. *East India Co.*, 1839, 5 Bing. 262, per Tindal C.J. at p. 274.

[3] *Gidley* v. *Lord Palmerston*, 1822, 3 Brod. & Bing. 275.

[4] *Gould* v. *Stuart*, [1896] A.C. 575.

[5] *De Dohsé* v. *Reg.*, 1886, 3 T.L.R. 114.

[6] *Shenton* v. *Smith*, *supra*.

[7] *Cf.* Orders in Council, 21st May 1855, 29th November 1898, s. 10.

[8] See COUNTY COUNCIL, Vol. IV. p. 569, *ante*.

[9] See BURGH, Vol. II. pp. 477, 481, *ante*.

[10] Cf. *Duff* v. *Grant*, 1799. Mor. 9576; *Simpson* v. *Tod*, 1824, 3 S. 150; *Farish* v. *Mags. of Annan*, 1836, 15 S. 107.

[11] Cf. *Rose* v. *Grant*, 1853, 15 D. 908.

[12] *Hastie* v. *M'Murtrie*, 1889, 16 R. 715, per Lord President at p. 731.

SUBSECTION (4).—*Demise of the Crown.*

957. Tenure of office is no longer affected by the death of the Sovereign. The Demise of the Crown Act, 1901, provides that the tenure "of any office under the Crown whether within or without His Majesty's Dominions shall not be affected nor shall any fresh appointment thereto be rendered necessary by the demise of the Crown." [5]

SUBSECTION (5).—*Compensation for Abolition of Office.*

958. At common law an officer has no right to compensation for abolition of his office. In practice, however, compensation is generally given *ex gratia*. In the case of civil servants provision is made in the Superannuation Acts for superannuation and retiring allowances. These Acts, however, are merely declaratory of the intention of the Crown, and confer no right which can be enforced in a court of law.[6] The position of officers of local authorities is similar. The Local Government (Scotland) Act, 1889, makes provision for the compensation of officers of county councils. Compensation falls to be assessed by the county council, and appeal lies only to the Treasury [7] and not to the courts of law. It is customary to insert similar rules in all statutes in which provision is made for the compensation of officers in the service of local authorities.

SECTION 5.—PRIVILEGE.

959. In the case of servants of the Crown privilege is essentially based on the royal prerogative. In their relations with the public the privilege of Ministers of the Crown is substantially that of the Crown itself and is considered elsewhere as such.[8] To inferior servants of the Crown privilege is allowed to an extent which varies with the nature of their office. Other public officers have no privilege, except in so far as the

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[1] *Mags. of North Berwick* v. *Lyle*, 1885, 23 S.L.R. 214, per Lord Ordinary at p. 215.

[2] *Mags. of Rothesay* v. *Carse*, 1903, 5 F. 383.

[3] *Ibid.*, 1902, 4 F. 641.

[4] *Mags. of Annan* v. *Farish*, 1835, 14 S. 111 ; 2 S. & M‘L. 930.

[5] 1 Edw. VII. c. 5.

[6] *Cooper* v. *Reg.*, 1880, 14 Ch. D. 311 ; *York* v. *R.*, [1915] 1 K.B. 852 ; *Considine* v. *M‘Inerney*, [1916] 2 A.C. 162 ; cf. *Alexander* v. *Forfarshire Education Authority*, 1930, S.N. 38.

[7] 52 & 53 Vict. c. 50, s. 120.

[8] See THE CROWN, Vol. V. p. 329, *ante*.

Public Authorities Protection Act, 1893,[1] applies to them. Judicial privilege is exceptional in respect that it is based not on the prerogative but on grounds of public policy, being allowed in the interests of the public themselves. It extends not only to servants of the Crown but also to officers in the employment of local authorities when exercising judicial or quasi-judicial functions.[2] It has been held that it does not extend to officers of other public corporations, such as hospitals,[3] but this decision has been doubted [4] and probably would not now be followed.

SUBSECTION (1).—*Judicial Acts.*

960. In order to preserve their independence and impartiality, judicial officers are absolutely privileged in respect of all acts done and words spoken in their judicial capacity.[5] The privilege applies to all judicial proceedings in all courts of law,[6] and also, it would appear, to any judicial proceeding in any tribunal, provided that it is recognised in law as a court, as, for example, a military court of inquiry.[7] The opinion has, however, been expressed that it does not apply to proceedings on a court martial.[8] In respect of words spoken, the rule is applied that absolute privilege will be recognised, "unless it can be demonstrated—that is, shewn so clearly that no man of ordinary intelligence and judgment could dispute it—that the words used had no connection with the case in hand." [9] In respect of acts done a similar rule would doubtless be applied. In cases where the judge is called upon to act judicially and at the same time ministerially, as where a Sheriff has issued a warrant for arrest, privilege is qualified, so that malice must be averred and proved [10] to elide the plea.

SUBSECTION (2).—*Quasi-judicial Acts.*

961. Where the act done or word spoken involves the exercise of a discretion but the decision is not so solemn as in a court of law, as in the case of decisions of local authorities [11] or of administrative tribunals,[12] or the exercise of his official discretion by a public prosecutor,[13] the officer is privileged provided that he acted or spoke *in bona fide.* The right of review of such decisions is generally determined by statute. In the case of a Minister of the Crown there is a presumption, in the absence of express contrary provision, that the decision is intended to be final. In the case of an inferior officer there is no such presumption.[1]

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[1] 56 & 57 Vict. c. 61; see para. 966, *infra.*

[2] *Shaw* v. *Morgan,* 1888, 15 R. 865.

[3] *Craig* v. *Jex-Blake,* 1871, 9 M. 973.

[4] *Shaw* v. *Morgan, supra,* per Lord Young at p. 871.

[5] *Scott* v. *Stansfield,* 1868, 3 Ex. 220, followed in *Harvey* v. *Dyce,* 1876, 4 R. 265.

[6] *Primrose* v. *Waterston,* 1902, 4 F. 783.

[7] *Royal Aquarium Society* v. *Parkinson,* [1892] 1 Q.B. 431, per Lord Esher M.R. at p. 442.

[8] *Smith* v. *Lord Advocate,* 1897, 25 R. 112, per Lord Justice-Clerk at p. 121.

[9] *Primrose* v. *Waterston, supra,* per Lord Moncreiff at p. 793.

[10] *Beaton* v. *Ivory,* 1887, 14 R. 1057; cf. *Linford* v. *Fitzroy,* 1849, 13 Q.B. 240.

[11] *Shaw* v. *Morgan, supra*; *MacLean* v. *Adam,* 1888, 16 R. 175; *Neilson* v. *Johnston,* 1890, 17 R. 442.

[12] *Everett* v. *Griffiths,* [1921] 1 A.C. 631, per Lord Haldane at p. 659.

[13] *Henderson* v. *Robertson,* 1853, 15 D. 292.

SUBSECTION (3).—*Ministerial Acts.*

962. The ministerial act of an officer which has been ratified by the Crown as an act of state, being thus based on the prerogative, is absolutely privileged, and cannot be challenged in a court of law,[2] unless there is reason to doubt that it is in fact an act of state, or to believe that it involves an invasion of private rights.[3] Other ministerial acts, if they involve the exercise of a discretion, are privileged in the same manner as quasi-judicial acts. If the act be purely ministerial, and allows no discretion to the officer, whether it be an act done or [4] a duty omitted,[5] it has no privilege even if done or omitted *in bona fide* and without negligence. As against an alien resident abroad a ministerial act is absolutely privileged,[2] but not as against an alien resident within the jurisdiction and entitled to the protection of the King's courts.[6]

SUBSECTION (4).—*Immunity from Statutes.*

963. In Scotland, prior to the Union of 1707, the Crown and its servants were bound by statute equally with its subjects. Owing, however, to the Union the prerogatives of the Crown of England are now the prerogatives of the Crown of Great Britain, and accordingly the English rule, that the Crown is not bound by statutes unless expressly named therein, has been adopted in Scotland.[7] The rule applies also to the servants of the Crown in the performance of their official duties.[8] It has been interpreted in the sense that there are certain statutes, such as penal and taxing statutes, by which the Crown and its servants are not bound unless liability is clearly expressed, but that there are others, such as those intended for the benefit of the public generally, by which there is no antecedent improbability that the Crown intends to be bound.[9] In each case it is a question of the construction of the particular statute. The rule does not apply to statutes passed prior to the Union of 1707.[10]

SUBSECTION (5).—*Litigation.*

964. In respect of their official acts servants of the Crown may be sued only in the Court of Session. In Scotland, as also in England, the theory of common law was that the King as the fountain of justice could not be subject to the jurisdiction of his own courts, and in early times claims against the Crown or its servants took the form of a petition addressed to the King in Council. On the institution of the Court of Session the Crown adopted the practice which has been since followed of submitting claims against it (voluntarily) to the jurisdiction of the Court of Session, but to that of no other tribunal. In particular cases the privilege may be waived or may be expressly surrendered by statute. It necessarily extends also to servants of the Crown in respect of their official acts.[1]

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[1] *Maclachlan* v. *Cameron*, 1899, 6 S.L.T. 384.

[2] *Poll* v. *Lord Advocate*, 1899, 1 F. 823.

[3] *Walker* v. *Baird*, [1892] A.C. 491.

[4] *Brasyer* v. *Maclean*, 1875, 6 P.C. 398.

[5] *Ferguson* v. *Earl of Kinnoull*, 1841, 3 D. 778 ; 1842, 1 Bl. 662.

[6] *Johnston* v. *Pedlar*, [1921] 2 A.C. 262, per Lord Cave at p. 275.

[7] *Advocate-General* v. *Mags. of Inverness*, 1856, 18 D. 366, per Lord Curriehill at p. 372 ; *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, per Lord Kyllachy at p. 1064.

[8] *Cooper* v. *Hawkins*, [1904] 2 K.B. 164.

[9] *Mags. of Edinburgh* v. *Lord Advocate*, 1912 S.C. 1085, per Lord President at p. 1091.

[10] *Advocate-General* v. *Mags. of Inverness, supra*, per Lord Curriehill at p. 371.

965. In Scotland procedure in actions against servants of the Crown is generally free from the formalities found necessary in England and follows closely that in an ordinary action. Officers of the Admiralty are in a special position [2] but officers acting on behalf of or in the interests of other Departments of State may, by consent of the Crown or of the Department of State concerned, be represented in litigation by the Lord Advocate.[3] Adoption in this manner by the Crown of the act of an officer does not necessarily make the act lawful,[4] but it eliminates the plea that the officer was not in fact acting as the agent of the Crown and confers on him the privileges of the Crown in litigation.

966. By the Public Authorities Protection Act, 1893, public officers are protected, after a period of six months, from actions by members of the public in respect of acts done in pursuance or in execution of a public duty.[5] The privilege applies both to servants of the Crown [6] and to other public officers, but not to officers of local authorities in proceedings against them by a Department of State.[7] It is immaterial whether the duty is owed to a particular locality or to the general public, provided that it is a duty to the public.[8] Public officers are similarly protected in certain other statutes applicable only to Scotland. In such cases the above provisions do not apply.[9]

Section 6.—Liability.

Subsection (1).—*In Contract.*

967. Since the King cannot act in person but only through his officers, the contracts of the Crown are made for it by its servants as its agents. They are not personally liable on contracts thus made,[10] unless there is the clearest evidence of their intention to be personally liable.[1] There is a presumption that in making a contract a servant of the Crown is acting on behalf of the Crown and within the scope of his authority.[2] He does not, however, warrant the authority of the Crown as principal, and therefore cannot be made liable for breach of such warranty.[3] In effect, in consequence of the application of these principles, it is seldom possible to find a servant of the Crown personally liable on a contract made in his official capacity.

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[1] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, per Lord Kyllachy at p. 1067, Lord Trayner at p. 1060, Lord Kincairney at p. 1072 ; cf. *Mags. of Helensburgh* v. *Brock*, 1905, 13 S.L.T. 98.

[2] *Cf.* Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), ss. 3, 6.

[3] Crown Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44), ss. 1, 4.

[4] See para. 962, *supra.*

[5] 56 & 57 Vict. c. 61, s. 1.

[6] *The "Danube II.,"* [1921] P. 183 ; *Wilson* v. *1st Edinburgh R.G.A. Volunteers*, 1905, 7 F. 168.

[7] Sec. 1.

[8] *Christie* v. *Glasgow Corporation*, 1899, 36 S.L.R. 694.

[9] Sec. 3 ; cf. *Montgomerie & Co.* v. *Haddington Corporation*, 1908 S.C. 127 ; *Duncan* v. *Mags. of Hamilton*, 1902, 5 F. 160.

[10] *Macbeath* v. *Haldimand*, 1786, 1 T.R. 172 ; *Palmer* v. *Hutchison*, 1881, 6 App. Cas. 619.

968. It may be noted that, in order to facilitate commercial transactions and to avoid the formalities required in proceedings against the Crown in England, certain of the Departments of State have by statute been incorporated, whose heads, although in fact merely agents of the Crown, have thus had the power conferred on them of contracting as principals. It has been pointed out that in effect proceedings on such contracts are directed against the Crown itself, which is sued through the medium of its servant, and further that the judgment is declaratory merely, since no execution can follow upon it, and there are no moneys available out of which damages can be paid, except moneys expressly provided by Parliament for the purpose.[4] It is therefore in all cases in the pleasure of the Crown whether the judgment will be satisfied or not.

969. The liability in contract of an officer of a local authority or other public corporation is substantially that of the agent of an individual principal.[5]

SUBSECTION (2).—*In Delict.*

970. From the principle that the King can do no wrong, it follows that he cannot authorise the doing of a wrong by another, even if the other is his agent, and accordingly the servants of the Crown are themselves alone liable for their wrongful acts.[6] It is no defence to a claim based on delict that the act was done by order of a superior officer, since a servant of the Crown has no contractual relationship with his superior officer, and he is the agent of the Crown alone.[7] Similarly no servant of the Crown is liable for the wrongful act of his subordinate unless he has expressly adopted it as his own.[8] In practice actions in delict are seldom brought against servants of the Crown personally, since they are seldom in a position to satisfy judgment when obtained. Occasionally, however, the Crown will defend the action on behalf of the officer, paying the costs and damages, if any, awarded, as in the case of actions for damage by collision brought against the navigating officer of one of His Majesty's ships. In one instance servants of the Crown have by statute been expressly made liable for the wrongful acts of their subordinates. An action for damages for the wrongful detention of a ship by a detaining officer of the Board of Trade may be brought against the secretary of the Board as if he were a corporation sole.[1] In such a case, however, the remedy is in substance against the Crown and not against its servant.[2]

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[1] *Dunn* v. *Macdonald*, [1897] 1 Q.B. 555.

[2] *Commercial Cable Co.* v. *Government of Newfoundland*, [1916] 2 A.C. 610.

[3] *Kenny* v. *Cosgrave*, [1926] I.R. 517.

[4] *Graham* v. *Commissioners of Public Works*, [1901] 2 K.B. 781, per Phillimore J. at p. 789.

[5] See AGENCY, Vol. I. p. 202, *ante*.

[6] *Feather* v. *Reg.*, 1865, 6 B. & S. 257; cf. *Macgregor* v. *Lord Advocate*, 1921 S.C. 847; *Smith* v. *Lord Advocate*, 1897, 25 R. 112.

[7] *Lane* v. *Cotton*, 1701, 1 Lord Raymond 646.

[8] *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

971. In the case of other public officers the maxim *qui facit per alium facit per se* is applied, and the local authority or other public corporation, whose agent he is, is liable for his wrongful act in the same manner as an individual principal is for the wrongful act of his agent, provided always that the act was within the scope of the authority of the officer [3] and was not *ultra vires* of the corporation.[4] It is immaterial to the liability of a corporation that its profits and emoluments cannot be applied to its own use,[5] and decisions to the contrary are now no longer law.[6]

972. Questions of difficulty as to liability may arise in cases where the officer is subject to the dual control of the central and of a local authority and it is uncertain whether he is in fact the agent of the Crown or of the local authority. The position of such an officer in any particular case can only be determined by a correct interpretation of the statute which regulates his duties with particular reference to such questions as who appoints, who pays, and who directly controls him. In a case where it was sought to make a municipal corporation liable for the negligence of a police constable it was pointed out that "the relations between the Commissioners (the Corporation) and the police are . . . unlike the ordinary relations between master and servant. The Commissioners are paymasters but do not fix the rates of pay. They appoint the Chief Constable, but cannot dismiss him. Subordinate members of the force they neither appoint nor dismiss. Any control which they exercise is of an indirect and very limited character. The main control rests with the Chief Constable. The powers and duties of the police force are independently described by statute. In short, they are not mere servants carrying out the instructions of a master, but rather joint agents with various authorities in securing the preservation of order and entrusted both with statutory and common-law powers for that purpose. They are truly servants of the State." It was accordingly held that the corporation was not liable.[7] On similar grounds a similar decision was reached in England with reference to the negligence of an inspector of a municipal corporation in the discharge of duties imposed upon him by the Board of Agriculture.[1] The various decisions of the courts are not easily reconcilable, but on a review of the authorities it has been suggested that the principle to be deduced is to be found in the imperative or permissive character of the duties imposed on the officer by the Crown. If these are imperative the local authority should be relieved of liability, since in that case he is truly acting as an agent of the Crown.[2]

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[1] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 460 (4).

[2] Cf. *Dixon* v. *Farrer*, 1886, 18 Q.B.D. 43.

[3] Cf. *Beaton* v. *Glasgow Corporation*, 1908 S.C. 1010; *Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.) 35.

[4] *Poulton* v. *London and South-Western Rly. Co.*, 1867, L.R. 2 Q.B. 534; cf. *Hockey* v. *Clydesdale Bank*, 1898, 1 F. 119.

[5] *Mersey Docks Trs.* v. *Gibbs*, 1866, L.R. 1 H.L. 93.

[6] *Virtue* v. *Police Commissioners of Alloa*, 1873, 1 R. 285.

[7] *Simpson* v. *Dundee Corporation*, 1928 S.N. 30; cf. *Fisher* v. *Oldham Corporation*, 1930, 46 T.L.R. 390; see also para. 952, *supra*.

SECTION 7.—REMEDIES.

SUBSECTION (1).—*Of Officer.*

973. For wrongful disturbance in office, either by the Crown itself with whom he has no binding engagement of service, or by his superior officer with whom he has no contractual relationship,[3] a servant of the Crown has no legal remedy, his only remedy being an appeal of an official or a political nature.[4] Against local authorities or other public corporations the remedy of an officer wrongfully disturbed in office is an action of declarator that he is entitled to continue in possession of his office.[5] This may in appropriate circumstances be combined with conclusions for interdict against further disturbance and for damages for past disturbance.[6] It is, however, incompetent to combine a declarator of possession with conclusions for damages for wrongful dismissal, since the two conclusions are incompatible. The action may be based either on contract or, if the appointment is statutory, on delict, on the ground that the act was *ultra vires*. In the former case all members of the authority should be called as defenders.[7] If the ground of action is not wrongful disturbance but merely undue interference with his freedom of action, the appropriate remedy is an action of suspension and interdict.[8]

SUBSECTION (2).—*Against Officer.*

974. Against judicial officers and other servants of the Crown the remedies of the Crown are considered elsewhere with reference to tenure.[9] Apart from express provision or established practice officers in the employment of local authorities or of other public corporations can only be removed by process of law.[10] If the ground of action is the fundamental nullity of the appointment the appropriate remedy is an action of declarator, but if the initial validity of the appointment is admitted procedure is by petition for removal. The two grounds of action, however, are incompatible and cannot be combined in the same process.[1] Pending the initiation of proceedings application may be made in the public interest to the *nobile officium* of the Court for appointment of an officer *ad interim*,[2] but if proceedings are already in dependence the application will be refused.[3]

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[1] *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838.

[2] Public Authorities and Legal Liability, by G. E. Robinson, pp. 35, 70, Introduction by Prof. J. H. Morgan, p. xiii.

[3] *Gidley* v. *Lord Palmerston*, 1822, 3 Brod. & Bing. 275.

[4] *Shenton* v. *Smith*, [1895] A.C. 229, per Lord Hobhouse at p. 235; cf. *Smith* v. *Lord Advocate*, 1897, 25 R. 112; *Mackie* v. *Lord Advocate*, 1897, 25 R. 769.

[5] *Fleming* v. *Dunlop*, 1837, Macl. & R. 547; *Rose* v. *Grant*, 1853, 15 D. 908; *Lawson* v. *Senatus of St. Andrews University*, 1898, 5 S.L.T. 269.

[6] Macfarlane and Cleghorn on Issues, p. 427.

[7] *Goldie* v. *Christie*, 1868, 6 M. 541.

[8] *Fleming* v. *Dunlop*, *supra*; cf. *Mags. of Annan* v. *Farish*, 1835, 14 S. 111; 2 S. & M'L. 950.

[9] See paras. 953–958, *supra*—Tenure.

[10] *Mags. of Rothesay* v. *Carse*, 1903, 5 F. 383.

975. Proceedings by members of the public against servants of the Crown are generally barred either by privilege or by the fact that their acts are the acts of the Crown itself. A servant of the Crown may, however, be restrained from carrying out a threatened act which is in fact outwith his powers.[4] Moreover, the opinion has also been expressed that an order for specific performance of a statutory duty may be made against a Minister of the Crown.[5]

976. It has been pointed out that, apart from statute, officers of local authorities and other public corporations frequently owe a fiduciary duty to members of the public which confers on the individual concerned a title at common law to sue them in order to prevent the infringement of that duty.[6] In cases where the duty is statutory there may be statutory provision for compensation in the case of infringement, but unless expressly excluded by the terms of the statute the common-law liability remains unimpaired.[7] It would appear that, apart from the question of privilege, the same principle may be applied to the duties of servants of the Crown.

SECTION 8.—ARRESTMENT OF PAY.

977. The pay of a servant of the Crown cannot be arrested in the hands of the Crown. The rule, which is one of public policy, is well established, and is similar in England. Unfortunately its precise basis has not yet been finally determined, the grounds of the various decisions being apparently conflicting. In a recent case, treated of consent as a test case, it was held that the rule applied not only to the pay of servants of the Crown, as that term is usually understood, but also to that of any person employed by the Crown and paid by the Treasury, however subordinate his position. Thus it applies to the wages of a telephone attendant employed in a Royal Dockyard.[8] In consequence of this decision the view, formerly held, that the rule is based on the necessity of preserving the dignity of office under the Crown and the efficient discharge of its duties can no longer be maintained.[1] In the case above referred to it was suggested that the true basis of the rule is that, since it is an implied condition in all engagements of service with the Crown that the servant shall not be entitled to sue the Crown for his pay, arrestment in the hands of the Crown of a sum to which the common debtor has no title is incompetent.[2]

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[1] Cf. *Reg.* v. *Saddlers' Co.*, 1863, 10 H.L.C. 404, per Lord Chelmsford at p. 469.

[2] *Mags. of Rothesay* v. *Carse*, 1902, 4 F. 641.

[3] *Mags. of Annan* v. *Farish*, 1835, 14 S. 111.

[4] *Nireaha Tamaki* v. *Baker*, [1901] A.C. 561.

[5] *Carlton Hotel Co.* v. *Lord Advocate*, 1921 S.C. 237, per Lord Salvesen at p. 249.

[6] *D. & J. Nicol* v. *Dundee Harbour Trs.*, 1915 S.C. (H.L.) 7, per Lord Dunedin at p. 13; cf. *Grahame* v. *Mags. of Kirkcaldy*, 1882, 9 R. (H.L.) 91, per Lord Watson at p. 95.

[7] *Hanley* v. *Mags. of Edinburgh*, 1913 S.C. (H.L.) 27; *Black* v. *Fife Coal Co.*, 1912 S.C. (H.L.) 33, per Lord Kinnear at p. 45.

[8] *Mulvenna* v. *The Admiralty*, 1926 S.C. 842.

978. The rule ceases to apply as soon as payment has been made. Questions may occasionally arise as to the precise period at which this has occurred, as where the practice is to credit the pay to the bank account of the officer under a pay warrant.[3] The rule has no application to the case of officers employed by local authorities or by public corporations and paid out of local funds, such as police constables,[4] or to pay in the form of casual payments or perquisites, such as that of a pursuivant-at-arms.[5] Such pay may be attached *quoad excessum.*[6] The rule does not operate to prevent the attachment of pay in the hands of the Crown by a trustee in bankruptcy. The circumstances in which this may be done are considered elsewhere with reference to the Bankruptcy (Scotland) Act, 1913.[7]

SECTION 9.—BANKRUPTCY (SCOTLAND) ACT, 1913.

979. It would appear that the pay of a public office held *ad vitam aut culpam* has already so far vested in the officer as to pass to his trustee in bankruptcy as "property" within the meaning of s. 97 of the Act.[8] It would appear also that retired pay, *i.e.* a pension given entirely in recognition of past services, has vested in the officer from the date of his retiral to the effect of passing similarly to his trustee in bankruptcy as "property" within the meaning of the section. The pay, however, of an office held during pleasure only, and the half-pay of a servant of the Crown, *i.e.* a pension given conditionally on the officer returning to the service of the Crown when called upon, are in a different position. In both cases, since the right is liable to be defeated at any time by the dismissal of the officer, the pay or half-pay can only be said to vest as and when it is paid.[9]

980. It has been expressly held that the pay of a public officer in the employment of a corporation and holding office during pleasure vests in his trustee in bankruptcy, *quoad excessum*, as it accrues from time to time, as *acquirenda* within the meaning of s. 98 of the Act. In such cases it is competent for the Court to pronounce *in præsenti* an order for payment to the trustee of instalments of salary receivable *in futuro*, under reservation to the trustee and to the bankrupt and to any other persons interested of the right to apply to the Court in the event of a change of circumstances.[1] On similar grounds the rule appears to apply also to the half-pay of a servant of the Crown.

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[1] *Mulvenna* v. *The Admiralty*, 1926 S.C. 842, per Lord Blackburn at p. 856.

[2] *Ibid.* at p. 859.

[3] Cf. *Jones* v. *Coventry*, [1909] 2 K.B. 1029.

[4] *Young* v. *Turnbull*, 1928 S.N. 46 ; cf. *In re Mirams*, [1891] 1 Q.B. 594.

[5] *Moinet* v. *Hamilton*, 1833, 11 S. 348.

[6] Cf. *Caldwell* v. *Hamilton*, 1918 S.C. 677, per Lord Justice-Clerk at p. 685, Lord Dundas at p. 689, Lord Salvesen at p. 695 ; *Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428, per Lord Atkinson at p. 441, per Lord Shaw at p. 456.

[7] 3 & 4 Geo. V. c. 20 ; see paras. 979–983, *infra*.

[8] Cf. *Barron* v. *Mitchell*, 1881, 8 R. 933, per Lord President at p. 936 : *Caldwell* v. *Hamilton*, *supra*, per Lord Dundas at p. 689.

[9] Cf. *Caldwell* v. *Hamilton*, 1919 S.C. (H.L.) 100, per Lord Dunedin at p. 109.

981. Special provision is made for the case of officers in the service of the Crown in the various Departments of State. Sec. 148 provides that in the event of the bankruptcy of such officers the Lord Ordinary or the Sheriff may order that such portion of the "pay, half-pay, salary, emoluments, or pension" of the officer as the head of the Department concerned shall consent to in writing, shall be paid to his trustee in bankruptcy to be applied in payment of his debts. It is not the practice of the Court to make such an order except with reference to such portion of the bankrupt's pay as exceeds a *beneficium competentiæ*. Thus where a pension of £46 a year was the sole means of support of the bankrupt an application for an order was refused.[2] Procedure is by petition, which should be intimated to the bankrupt.[3] It should be noted that the section is not inconsistent with the principle that pay cannot be attached in the hands of the Crown, since the order can only be made if the written consent of the Crown has been first obtained.

982. Sec. 183 provides that a person whose estate has been sequestrated by a competent court in Scotland "is disqualified from being elected to or holding or exercising the offices of dean of guild, deacon-convener of trades, or a member of a town, county, or parish council or school board or of any local authority under any Act for the time being in force relating to local government in Scotland." This disqualification, however, is removed and ceases to have effect in the event of the recal or reduction of the sequestration or the discharge of the bankrupt. It has been held that the operation of the disqualification was not struck at by the Burghs (Scotland) Act, 1853,[4] which imposed a time limit of one month on proceedings for reducing the election of "a councillor, provost, or magistrate," or for finding it null or for interdicting such officers from acting as such.[5]

983. Sec. 184 provides that the provision of the English Bankruptcy Act, 1883,[6] whereby, if certain officers have been "adjudged bankrupt" while holding office, their offices shall thereby become vacant, shall apply also to the officers enumerated in s. 183 above.

SECTION 10.—CORRUPTION IN OFFICE.

984. In respect of certain military offences military officers are only responsible to military courts. Apart from this specialty, corruption in office may take the following forms:—

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[1] *Caldwell* v. *Hamilton*, 1919 S.C. (H.L.) 100, per Lord Dunedin at p. 109.

[2] *Scott's Trs.* v. *Scott*, 1885, 12 R. 540.

[3] Sec. 182.

[4] 16 Vict. c. 26, s. 5.

[5] *Thom* v. *Mags. of Aberdeen*, 1885, 12 R. 701.

[6] 46 & 47 Vict. c. 52, s. 34.

SUBSECTION (1).—*Disclosure of Official Information.*

985. The law is codified by the Official Secrets Acts, 1911 and 1920. By the Official Secrets Act, 1911, the wrongful communication by any public officer of "any sketch, plan, model, article, note, document, or information" is a criminal offence.[1] By the Official Secrets Act, 1920, the personation by any one of "a person holding office under His Majesty, for any purpose prejudicial to the safety or interests of the State within the meaning of the principal Act," is a criminal offence.[2]

SUBSECTION (2).—*Extortion.*

986. Any public officer who, from improper motive and under colour of his office, takes from any person any money or valuable thing, which is not due from such person at the time when it is taken, is guilty of a common-law offence.[3]

SUBSECTION (3).—*Oppression.*

987. Any public officer who, from improper motive and under colour of his office, inflicts upon any person any illegal bodily harm, imprisonment, or any injury, other than extortion, is guilty of a common-law offence.[4]

SUBSECTION (4).—*Bribery.*

988. At common law the acceptance, and probably also the solicitation, of bribes by a public officer is a criminal offence.[5] To receive money, however, before appointment to office is not in itself criminal, unless it has been given in anticipation of the appointment, and is intended to influence the conduct of the officer after appointment. The mere expression of willingness to receive a bribe is not solicitation. The opinion has been expressed that to allow an officer to retain money given to him before his appointment is not a bribe.[6]

989. The law has now been largely codified by the Prevention of Corruption Acts, 1889 to 1916. By the Public Bodies Corrupt Practices Act, 1889, the solicitation or acceptance of bribes by "members, officers, or servants of corporations, councils, boards, commissions, and other public bodies" is a crime.[7] By the Prevention of Corruption Act, 1906, corrupt transactions with the agents of public officers is a crime,[8] the expression agent being defined as a "person serving under the Crown or under any corporation, or any municipal, borough, county, or district council, or any board of guardians."[1] Under this provision it has been held that a police constable is the agent of the chief constable.[2] By the Prevention of Corruption Act, 1916, corruption is presumed in certain cases, where a "person in the employment of His Majesty or any Government Department or a public body" has received any money gift or other consideration from a person holding or seeking to obtain a public contract.[3]

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[1] 1 & 2 Geo. V. c. 28, s. 2.

[2] 10 & 11 Geo. V. c. 75, s. 1 (i), (*d*); *cf.* para. 995, *infra*—Holden and Reputed Office.

[3] Co. Litt. 368*b*; Hume, Com. i. 407; Macdonald, Criminal Law, 4th ed., p. 185.

[4] Stephen's Digest of the Criminal Law, 7th ed., p. 113; Hume, Com. i. 407; Macdonald, Criminal Law, 4th ed., p. 185.

[5] Hume, i. 407; Macdonald, Criminal Law, 4th ed., p. 238.

[6] *H.M. Advocate* v. *Dick*, 1901, 3 F. (J.) 59, per Lord Young at p. 62.

[7] 52 & 53 Vict. c. 69, preamble, s. 1.

[8] 6 Edw. VII. c. 34, s. 1 (i).

SUBSECTION (5).—*Breach of Trust.*

990. At common law anyone who "in any station of public trust should be notoriously careless of the welfare of that which is committed to him" is guilty of a criminal offence, and the Act 1457, c. 76, "anent the punition of negligent officiars" is merely declaratory.[4] Officers entrusted with the care of money or valuables, who misappropriate them, are guilty of a more serious offence than other persons in like circumstances, since they have not only the custody but also the possession and management of the funds, and reliance has been placed on the security found by them.[5] It has been doubted whether the violation of the oath *de fideli administratione officii* is truly perjury, since the officer may at the moment of the oath be sincere in his profession although he afterwards departs from it.[6] Refusal to serve in a public office to which a person has been duly appointed, if he has had proper notice of his appointment, and neglect to perform duties imposed by common law or statute are criminal offences.[7]

SUBSECTION (6).—*Sale of Office.*

991. Sale or deputation of office may, in certain circumstances, be a crime.[8]

SUBSECTION (7).—*Particular Offences.*

992. Certain offences in respect of particular offices have been created by statute. Of these the most important are those which refer to offices of the Post Office and of the Revenue. At common law officials of the Post Office who open, intercept, or detain letters are guilty of a criminal offence.[9] The law has now been largely codified. By the Post Office Act, 1908, in addition to the above offences, the detention or delay of letters contrary to duty and the disclosure or interception of the contents of telegrams are crimes.[10] By the Telegraph Act, 1868, the disclosure or interception contrary to duty of the contents of telegrams by anyone with official duties connected with the Post Office, or acting on behalf of the Postmaster-General, is a crime.[1] By the Inland Revenue Regulation Act, 1890, any revenue officer who asks for or receives any money, recompense, or promise, or enters a collusive agreement for the purpose of defrauding His Majesty; [2] any collector of inland revenue who neglects to keep or render the prescribed accounts; [3] and any excise officer who trades in goods subject to excise duty or is concerned in any business subject to any law of excise,[4] is guilty of a crime.

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[1] 6 Edw. VII. c. 34, s. 1 (3).

[2] *Graham* v. *Hart*, 1908 S.C. (J.) 26.

[3] 6 & 7 Geo. V. c. 64, s. 2.

[4] Hume, i. 411.

[5] Hume, i. 61; Macdonald, Criminal Law, 4th ed., p. 70.

[6] Hume, i. 371.

[7] See para. 996, *infra—Munera Publica.*

[8] See para. 993, *infra*—Sale of Office; para. 994—Deputation of Office.

[9] Hume, 3rd ed., i. 67; Macdonald, Criminal Law, 4th ed., p. 70.

[10] 8 Edw. VII. c. 48, s. 56.

Section 11.—Sale of Office.

993. In his Commentaries Bell states the common law as follows:—"In Scotland all heritable offices may be voluntarily sold or adjudged and judicially sold for debt. So all patrimonial offices such as are descendible to heirs and assignees may be sold or adjudged. Offices which are not patrimonial but in which there is a personal trust reposed are not saleable nor capable of being attached by diligence." But he adds: "The practice in Scotland has been extremely loose; and examples have occurred of the sale even of offices connected with the administration of justice." [5] Sale of office is now regulated by the Sale of Offices Act, 1809,[6] which, in addition to extending the Act 6 Edw. VI. c. 16, "against buying and selling of offices," to Scotland, provides that any person or persons buying or selling or receiving or paying money or rewards for offices shall be guilty of a criminal offence.[7] Certain offices of the Household and commissions in the army are expressly excepted.[8] A further exception is made of certain ancient offices and of any offices which were legally saleable before the passing of the Act.[9] The Act is substantially declaratory of the common law of Scotland. It does not affect materially the sale of ancient heritable offices, and, since the Act 1455, c. 44, it has been illegal for the Crown to create any new heritable office. Generally, therefore, it may be said that the question whether or not a heritable office may be sold is determined by ancient usage, by the express terms of the original grant or by the nature of the office itself. Certain offices, more particularly those which descend *jure sanguinis*, are *extra commercio*.[10] The majority, however, of heritable offices are capable of sale.[11] At common law, on grounds of public policy, the sale of personal office has always been illegal.[12]

Section 12.—Deputation of Office.

994. The same general principles are applied in the case of deputation of office. By the Sale of Offices Act, 1809, deputation for profit is a crime,[13] but an exception is made in favour of offices formerly deputable and of lawful deputations.[1] These provisions are declaratory of the common law and are based on grounds of public policy.[2] Although deputation is in general illegal, the question whether any particular office may be performed by deputy is to be determined by ancient usage, by the express terms of the grant of office, or by the nature of the office itself.[3] Thus the office may be such that performance by deputy is in the public interest, as where serious inconvenience would be caused by interruption of its performance even for a brief period.[4] Generally heritable offices which descend *jure sanguinis* cannot be deputed,[5] but in England in a case where such an office had descended to two co-heiresses they were allowed, subject to the approval of the Crown, to appoint a deputy.[6]

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[1] 31 & 32 Vict. c. 110, s. 20.

[2] 53 & 54 Vict. c. 21, s. 10.

[3] Sec. 14 (2).

[4] Sec. 7.

[5] Com. i. 125.

[6] 49 Geo. III. c. 126.

[7] Secs. 3, 13.

[8] Sec. 7.

[9] Sec. 9.

[10] *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237; 1910 S.C. (H.L.) 35.

[11] *Cockburn* v. *Langton's Crs.*, 1747, Mor. 150, 157; 1755, 4 Pat. App. 603.

[12] *Thomson* v. *Dove*, 16th February 1811, F.C.: cf. *Hill* v. *Paul*, 1840, 2 Rob. App. 524.

[13] 49 Geo. III. c. 126, s. 3.

SECTION 13.—HOLDEN AND REPUTED OFFICE.

995. It is a common-law principle that the actings of a person, who is in fact in possession of an office and is popularly reputed to be its holder, provided always that the actings are within the powers attached to the office, cannot be impugned.[7] The rule, which is the same in England, has been thus stated: "as to those who are known and holden and reputed, accordingly to the language of the cases, to be the proper possessors of and exercising the duties of an office, their acts shall be good so long as they hold and exercise the duties of those offices; although in point of fact they may not have, upon investigation, any title to the offices of which they were so exercising the duties." [8] This rule has been applied to the effect of upholding the sentence of a church court of which some of the members were not qualified; [9] the sentence of a reputed magistrate; [10] and the ordinance of an improperly constituted court.[11] Its application is, however, limited to the case of unqualified persons exercising known offices and does not apply to persons assuming offices which have no existence in law.[12] It should be noted, however, that personation of an officer may be a criminal offence. By the Official Secrets Act, 1920,[13] anyone who, for any purpose prejudicial to the safety or interests of the State within the meaning of the Official Secrets Act, 1911,[14] personates or falsely represents that he is a person holding office under His Majesty is guilty of a crime.

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[1] 49 Geo. III. c. 126, ss. 9, 10.

[2] Bell, Com. i. 125; cf. *Mason* v. *Wilson*, 1844, 7 D. 160; *Ord* v. *Hill & Paul*, 1847, 9 D. 1118.

[3] Cf. *Hog* v. *Kerr*, 1681, Mor. 13106; *Lord Clerk Register* v. *Stuart*, 1795, Mor. 13140.

[4] *Burial Board of St. Margaret, Rochester* v. *Thompson*, 1871, L.R. 6 C.P. 445.

[5] *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237; 1910 S.C. (H.L.) 35.

[6] *Ex parte Burrell*, 1781, 2 Bro. P.C. 146.

[7] Cf. *Duke of Hamilton* v. *Laird of Clackmannan*, 1665, Mor. 13092; Stair, iv. 42, 12; Ersk. iv. 2, 6.

[8] *Livingstone* v. *Proudfoot*, 1849, 6 Bell's App. 469, per Lord Cottenham L.C. at p. 481.

[9] *Livingstone* v. *Proudfoot*, *supra*.

[10] *M'Arthur* v. *Linton*, 1864, 2 M. 659.

[11] *Macgregor* v. *Cox*, 1897, 35 S.L.R. 273.

[12] *Cumming* v. *Munro*, 1833, 12 S. 61; *Forrest* v. *Harvey*, 1845, 4 Bell's App. 197.

[13] 10 & 11 Geo. V. c. 75, s. 1 (i) (*d*).

[14] 1 & 2 Geo. V. c. 28.

SECTION 14.—MUNERA PUBLICA.

996. In early Scots law certain public duties existed which no one properly qualified and duly called upon was entitled to decline to perform. These were known as *munera publica.*[1] The doctrine is said to be based on Roman law,[2] but it may be noted that the law of England is similar. In England the King might compel his subjects to serve in such offices as the public interest and the nature of the Constitution required.[3] In both countries the rule is now in abeyance, except in a few special cases, such as that of service on juries. At a later period the expression *munus publicum* appears to have been used to describe certain public offices whose duties had been established by ancient usage. Thus it has been applied to the office of a minister of the established Church;[4] of a parochial schoolmaster;[5] and of the town-clerk of a royal burgh.[6] The tenure of these offices was by usage *ad vitam aut culpam.* With reference to offices of such a nature that a life tenure is necessarily implied, it has been observed that "in this last class are embraced only offices of the nature of *munera publica.* Public officers are irremoveable except for fault. Holders of benefices in the Church are public officers, and these offices are *munera publica.*"[7] The exercise of offices formerly known as *munera publica* is now largely regulated by statute, and the expression is now rarely used.

SECTION 15.—PRIVATE OFFICE.

997. Private office differs from public office in respect that it is derived neither directly nor indirectly from the Crown but from a private authority and fulfils no public purpose. Generally the same principles hold as in the case of public office, with the exception that, in private office, it is seldom necessary to apply principles of public policy. Public policy, however, cannot be entirely ignored, more particularly in cases where the moral character of the officer is material, as in the case of a teacher in a private school.[8] In private, no less than in public, office it is essential that the officer should be independent and impartial in the discharge of his duties, and for this reason, unless it has been otherwise expressly provided, the appointment continues *ad vitam aut culpam.*

998. The relationship of a private officer to the authors of his appointment, and in particular the effect of an appointment *ad vitam aut culpam,* have been considered with reference to the position of a teacher in a private school, it being observed: "A very mistaken notion seems to be entertained of the effect of such a teacher receiving his appointment *ad vitam aut culpam.* It seems to be thought that the effect of such an appointment is to alter the relation which subsists between him and those who appoint him and manage the institution, so that his conduct is not to be judged of by them, or the *culpa* to be established by their judgment and decision. This is a serious error. They are still his employers, and have the general rights and duties of that relation as much as before, with the single exception that they cannot dismiss him except when serious misconduct or inefficiency shall be established; but the right to enquire, judge, and dismiss him still remains with them. It is their opinion by which the *culpa* is to be judged of, as the late Lord President said, and the Court will interfere only when there is irregularity, precipitation, and oppression in the course of the proceedings, and manifest failure to make out any serious case on the merits; and, above all, the power to enquire into all matters or rumours affecting the teacher's character and usefulness, remains with them unaffected by the tenure of his situation."[1] Thus the appointment does not remove the officer from the control of the authors of the appointment. When charges are brought to their notice they are entitled to investigate and to form their own judgment upon them, and if the inquiry discloses serious fault they are entitled to dismiss the officer. The fault, although it must be serious, need not amount to malversation of office.[2] It is unnecessary to proceed by judicial process in order to discharge the officer, and similarly the officer should not have recourse to judicial process unless his dismissal has been irregular or oppressive.[1] The officer is entitled to reasonable notice of dismissal or to a money payment in lieu thereof.[3]

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[1] Ersk. i. 7, 20; cf. *Innes* v. *Notaries of Elgin,* 1612, Mor. 13089.

[2] Dig. 50, 4, 14.

[3] *R.* v. *Clarke,* 1787, 1 Term Rep. 679; *Morris* v. *Burdett,* 1813, 2 M. & S. 212, per Lord Ellenborough C.J. at p. 218.

[4] *Hastie* v. *M'Murtrie,* 1889, 16 R. 715.

[5] *Mitchell* v. *Elgin School Board,* 1883, 10 R. 982, per Lord Shand at p. 990.

[6] *Mags. of Rothesay* v. *Carse,* 1903, 5 F. 383.

[7] *Hastie* v. *M'Murtrie, supra,* per Lord President at p. 731.

[8] *Mags. of Montrose* v. *Strachan,* 1710, Mor. 13118.

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[1] *A. B.* v. *C. D.*, 1844, 6 D. 1238, per Lord Justice-Clerk at p. 1243.

[2] *Abercromby* v. *Goldsmiths of Edinburgh*, 1802, Mor. 13154.

[3] *Morrison* v. *Abernethy School Board*, 1876, 3 R. 945.

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SECTION 1.—INTRODUCTORY.

999. The term "Officers of State" is not susceptible of exact definition, and although it is used by writers on Scottish legal antiquities and in the Acts of the Scottish Parliament, it is nowhere used by writers on English constitutional history. Sir George Mackenzie points out [1] that in Scotland there were previously both Officers of the Crown and Officers of State. The Officers of the Crown were all designed "of Scotland," as *Constabularius Scotiæ*, etc. By the Act 31 Parl. 11 James VI., the Officers of the Crown are declared to be the Treasurer, the Secretary, the Collector (an office subsequently joined with that of Treasurer), the Justice-General, the Justice-Clerk, the Advocate, the Master of Requests, and the Clerk of Register. "Though these be called Officers of the Crown there, I conceive they differ not from the Officers of State, and these words *Officers of the Crown* and *Officers of State* are now equipollent terms, so far that all the Officers of State are Officers of the Crown by this Act. But the High Chamberlain, Constable, Admiral, and Marishal are Officers of the Crown, but are not Officers of State; the speciality of Officers of State being, that in all Acts or Meetings which concern the State they sit as members by virtue of their office, as in Parliaments, Conventions, etc., where the Chamberlain and Admiral come not as such, nor the Constable and Marishals, if they were not Earls." [2] From the Acts of the Scottish Parliament, however, it does not seem possible to draw this distinction, as it would appear that in early times, before the office of Treasurer was instituted, the Chamberlain did sit in Parliament, and indeed at different times different Officers of the Crown wielded power. Some confusion inevitably results from the fact that several offices were sometimes combined in one person and that the duties imposed upon the respective officers differed from reign to reign.

1000. There were, however, no great Officers of the Crown previous to the reign of Alexander I. Then charters granted by the King were witnessed by his Chancellor and Constable, the former marking the introduction of royal fiefs and charters, the latter the rise of a feudal baronage. A Justiciar also first occurs in this reign.[3] The offices of Great Steward, High Constable, and Great Chamberlain appear in the reign of David I., and in 1445 the Keeper of the Privy Seal, the Clerk of Rolls and Register, and the Secretary witness a charter in Parliament.[4] In 1545 the Secretary, the Comptroller, the Clerk of Register, and the Advocate are members of the Privy Council,[5] and in 1558 a commission was granted by Parliament to the Queen Dowager as regent to nominate the Chancellor, the Treasurer, the Comptroller, and to supply "all other offices of the Crown which may become vacant." [6] In 1578 [7] eight

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[1] Mackenzie, Observations on Precedency, chap. viii.

[2] Mackenzie, *ibid.* See Juridical Review, xxiii. 152.

[3] A.P.S. (Rec. ed.), i. 10.

[4] *Ibid.*, i. 11; ii. 59.

[5] *Ibid.*, ii. 597*a*.

[6] *Ibid.*, ii. 519*b*.

[7] *Ibid.*, iii. 96.

Officers of State were to serve on the Council, namely, the Lord Chancellor, the Treasurer, the Secretary, the Comptroller, the Clerk of Register, the Clerk of Justiciary, the Advocate, and the Keeper of the Privy Seal. George Buchanan, Preceptor to the King, was included among "the Officers of Estate" in 1579.[1]

1001. The number of Officers of State to be named by the King as Lords of the Articles varied between five and ten. In 1593 the list of Officers of State on the Articles was: the Chancellor, the Treasurer, the Treasurer Depute, the Secretary, the Comptroller, the Justice-Clerk, and the Collector;[2] and in 1604: the Master of Requests, the Keeper of the Privy Seal, the Comptroller, the Collector, the Justice-Clerk, and the Advocate,[3] while in 1606 the number had increased to ten by the addition of the Chancellor, the Treasurer, the President, and the Clerk of Register. In 1587 the Master of Gardrobe and the Elemosynar (Almoner) were named among the Officers of the Crown.[4] Towards the end of the sixteenth century the functions of the various Officers of State were somewhat indeterminate, and in 1592 the Treasurer, the Comptroller, the Collector, and the Secretary were to agree among themselves as to their proper duties.[5]

1002. There appear to have been frequent rivalries for precedence amongst the Officers of State; in consequence of which King James, in Privy Council on 17th June 1617, declared that in Parliament only eight Officers of State should sit as such. These he ranked by Act of Council thus: Treasurer, Privy-Seal, Secretary, Register, Advocate, Justice-Clerk, Treasurer-Depute, Master of Requests. In several Parliaments, however, the Chancellor, the Collector, and the Comptroller sat as Officers of State, notwithstanding this Act.[6]

1003. During the reigns of the later Stuart Kings there was continual discussion between King and Parliament as to whether the King had the right to nominate the Officers of State without the consent of Parliament. In 1641 an Act of Parliament was passed declaring that "no Officer of State was to have a voice or seat in Parliament," and repealing the Acts conferring that right. At the same time it was enacted that "noblemen being Officers of State shall have precedence only according to their creation, the Lord Chancellor excepted."[7] Thereafter King Charles I. engaged that he would submit the names of all Officers of State whom he proposed to appoint to Parliament.[8] In 1649, however, Parliament, displeased with the attitude of the King, held itself bound to fill the places of the Officers of State and decreed that those appointed should hold office *ad vitam vel culpam.*[9] Nevertheless in 1661 it was declared that the nomination of the Officers of State was undoubtedly part of the Royal Prerogative.[10]

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[1] A.P.S. (Rec. ed.), iii. 150*b*.
[2] *Ibid.*, iv. 8*a*.
[3] *Ibid.*, iv. 260*b*.
[4] *Ibid.*, iii. 562.
[5] *Ibid.*, iii. 563*a*.
[6] Mackenzie, Observations on Precedency, chap. viii.
[7] A.P.S. (Rec. ed.), v. 329*b*, 623*b*.
[8] *Ibid.*, 340*b*.
[9] *Ibid.*, 273*a*.
[10] *Ibid.*, vii. 10.

1004. Between 1661 and the Treaty of Union in 1707 there seems to have been constant disagreement as to the order of precedence among Officers of State. This was regulated by Act of Parliament from time to time, but in 1690 it was enacted that "such Officers of State as seem proper to the King may be on committees of Parliament. They may propose and debate, but they may not vote. No Officers of State shall be otherwise admitted in any committee of Parliament without prejudice to the estate of noblemen to choose such of their own estate as are Officers of State to be members of committees." [1] In 1703 it was debated in Parliament as to whether the Commission of Officers of State should fall on the death of the sovereign,[2] and in 1704 Parliament decided in the affirmative.[3] It was further agreed in 1705 that the nomination of Officers of State should be by the Estates of Parliament alone.[4] Now, of course, Officers of State, as such, have no right to seats in Parliament.[5]

1005. Accordingly it would appear that all the great officers of Scotland should be included under the term "Officers of State," and these include: the Admiral, the Lord Advocate, the Almoner, the Chancellor, the Chamberlain, the Clerk of Register, the Collector-General, the Comptroller, the High Constable, the Justice-Clerk, the Justiciar, the Master of the King's Household, the Master of the King's Wardrobe, the Master of Requests, the Marischal, the Keeper of the Privy Seal, the Secretary, and the Treasurer. Among the Officers of State in Scotland to-day one would include the Lord Lyon King of Arms as the King's principal Officer of Arms in Scotland, the Solicitor-General, and the King's and Lord Treasurer's Remembrancer. Most of the offices are now obsolete, and some were displaced by English equivalents after the Union, but there still remain the Lord Advocate, the Lord Justice-General in place of the Justiciar, the Lord Justice-Clerk, the Keepers of the Great and Privy Seals, the Lord Clerk-Register, and the Lord High Constable, with all their former rights and privileges.

SECTION 2.—OFFICERS OF STATE IN SCOTLAND BEFORE 1707 AND NOW ABOLISHED.

SUBSECTION (1).—*The Admiral.*

1006. The Lord High Admiral of Scotland had very extensive powers. He commanded the King's ships and sailors, and had the inspection of all seaports, harbours, and sea-coasts in the kingdom. He had a particular tribunal the jurisdiction of which was prescribed by an Act of Parliament in 1554,[6] and again in 1567.[7] Originally he presided in his Court in person, but later he delegated his duties as President of the Court to a Deputy Judge Admiral. In this Court cognizance was taken of all crimes committed at sea, as well as of quarrels and actions concerning crimes, faults, and trespasses committed upon the sea, or in the ports or creeks thereof or in fresh and navigable rivers so far as the sea flows and ebbs.

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[1] A.P.S. (Rec. ed.), ix. 113.

[2] *Ibid.*, xi. 73*b*, 74*a*.

[3] *Ibid.*, xi. 137*b*.

[4] *Ibid.*, xi. 223*a*.

[5] Ersk. i. 3, 8.

[6] A.P.S. (Rec. ed.), ii. 449*b*.

[7] *Ibid.*, iii. 41.

1007. Adam Hepburn, Earl of Bothwell, was made hereditary Lord Admiral of Scotland, and upon his forfeiture the office was conferred upon Francis Stewart, Earl of Bothwell. Charles II. eventually conferred it upon his natural son whom he created Duke of Lennox and Richmond, who resigned it into the hands of the Crown in 1703. After the Treaty of Union, a vice-admiral only was appointed by the Crown to act as judge in civil affairs relating to naval and commercial concerns in Scotland. See ADMIRALTY.[1]

SUBSECTION (2).—*The Almoner.*

1008. The earliest record we have of the "*elemosinarius*" or the King's Almoner is in 1255 when Friar Richard of the Order of Knights Templar was removed from the King's Council.[2] It is not very clear what exactly were the duties of this officer. He appears again, however, in 1592, when "Mr Peter Young, Eleemosyner," was named among the Officers of State,[3] and in 1593 when the "Master Almonsser" was nominated to the Privy Council [4] and ordered to execute letters to ordinary judges to enforce Acts against beggars.[5]

SUBSECTION (3).—*The Chancellor.*

1009. There seems little doubt that the word chancellor is derived from the Latin *cancellarius*, the doorkeeper or guardian of the *cancelli*, that is, the gratings or railings of the theatre, the barriers used in the public games, or the bar of the Forum. But George Crawford, author of "The Lives and Characters of the Officers of the Crown and of the State in Scotland" in 1726, says: "But most of the Civilians and Feudalists fetch the original of the word 'Chancellor,' *a cancellando*, i.e. *a digniore parte officii*, from the highest point of his jurisdiction, which was to strike and dash out with cross-lines lattice like, such letters, commissions, warrants, and decrees, which passed the princes' Great Seal against Law and Right, or were prejudicial to the Commonwealth, which not improperly they termed to cancel. For in a late Glossary we read, a chancellor is he whose office is to look into and peruse the writings of the Sovereign, to cancel what is written amiss, and to sign that which is well."

1010. The term was afterwards applied to the clerk or scribe who sat for the transaction of business in his chancery, or office screened off from the public Court of law. Still later, the *cancellarius* becomes the adviser and often the confessor and conscience-keeper of the emperors.

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[1] Vol. I. p. 149, *ante*.

[2] A.P.S. (Rec. ed.), i. 419*a*.

[3] *Ibid.*, iii. 562*a*.

[4] *Ibid.*, iv. 34*a*.

[5] *Ibid.*, iv. 104*b*, 106*a*.

both Western and Eastern; while similar officials were appointed by the papal *curia*, by the Episcopal dioceses, by many of the monasteries, and by the universities. Under the Carolingian monarchs the chancellor was simply one of the royal notaries, a body presided over by the arch-chancellor, to whom was committed the custody of the royal seal. At that period, too, there existed another important official called the arch-chaplain, or King's chief cleric; but the King's chancery and his chapel soon came to be merged and united under a single official, thenceforth known as the chancellor. In England this official is expressly mentioned for the first time in the reign of Edward the Confessor, although his office had doubtless existed as far back as the time of Dunstan. For the functions of the English Lord Chancellor as "guardian of all infants, idiots, and lunatics," "keeper of the King's conscience," etc., the reader is referred to the pages of Blackstone; but it is of chief importance to remember that the English Chancellor, in directing the King how to exercise his royal prerogative of entertaining appeals from the law-courts, became the founder of the "equity" system of jurisprudence, as opposed to the "common-law."

1011. In the history of Scotland the Chancellor appears for the first time in the reign of Alexander I., as a witness of charters, at the beginning of the twelfth century, when royal fiefs and charters were first introduced. He is also the official who, by the King's writ, affords redress to appellants who have been wronged by the Courts of law or by persons in power. But a marked divergence soon takes place between the English and the Scottish Chancellor. Both were indeed almost invariably Churchmen down to the Reformation, but the English Chancellor derived his notions of equity mainly from the canon law, a system differing widely from the common law; while in Scotland he was largely guided by the civil law of Rome, which he had learned in the great continental universities, and which gradually came to be adopted as the basis of the common law of Scotland. Moreover, from the time of Edward I., and particularly from that of Edward III., the English Chancellor presided over the Court of Chancery, with its many-sided equitable jurisdiction, while the Scottish Chancellor held no separate Court of his own. Hence the antagonism of law and equity in England, and hence the absence of such antagonism in Scotland. As in England, the Lord Chancellor of Scotland was Keeper of the Great Seal; but when this function was transferred to the English Lord Chancellor by the Treaty of Union, the Scottish office of Chancellor ceased to exist. The official business of sealing writs is, however, still transacted by the Chancery department in Scotland, while the English Lord Chancellor has no jurisdiction over Scotland, except as President of the House of Lords when sitting as a Court of Appeal in Scottish cases.

1012. It remains to add a few of the multifarious rights and duties of the Scottish Chancellor, as gleaned from the Scottish Acts, the Register of the Privy Council, and other sources. He was at the head of the law;

he received appeals to Parliament; he granted seisins from Chancery; he intimated statutes to Justices and Sheriffs; he wrote letters in the King's name, under the King's Great Seal; he visited royal hospitals; he usually sat thrice annually with certain members of the Three Estates to hear causes remitted to him by the King's council; he licensed the clergy to travel abroad; he collected the King's dues; he presided in the Court of Session (1532); he was to sit weekly to treat of matters concerning the common weal; it was treason to slay him (1546); he was censor of the press (1574); the election of commissioners for shires must be reported to him; he admitted scribes and notaries to office; he touched Acts of Parliament with the sceptre; he attended constantly on the King; he granted leave to members of Parliament to speak (James I., 1607); he presided over the Lords of the Articles and over the Privy Council; he took precedence over all other Officers of State, except in Exchequer when the principal treasurer was present; he was a member of all committees of Parliament; and lastly, he was entitled to have the Great Seal carried before him, and to have the first place at all public meetings. As to the mode of his appointment, it may suffice to state that, while nominally elected by Parliament, he was really, as a rule, appointed by the King. Thus in 1543 he was appointed by the Regent and the Lords of the Articles; in 1584 he was nominated by the King and approved by Parliament; and in 1641 he was appointed by the King, with the advice of Parliament. And so, too, he was nominally responsible to Parliament as well as to the King, but it need hardly be said that of his ministerial responsibility, in the modern sense, there is no trace.

SUBSECTION (4).—*The Chamberlain.*

1013. The Great Chamberlain of Scotland—*Camerarius*—was a high Officer of State and of law. He was keeper, apparently, of the King's treasury chamber until the institution of the office of treasurer by James I. He had a universal jurisdiction in relation to burghs in the matters of customs, police, and trade, the regulation of weights and measures, and the observance of law. It was his duty to hold periodical wapinshaws in the burghs, to examine the burgh accounts, and see that the burgh revenues were properly expended. In the exercise of his jurisdiction he held circuits—Chamberlain-Airs—in the burghs. Appeals lay to him from the decisions of the magistrates; and an appeal might be taken from the Chamberlain-Air to the Chamberlain Court—the Court of the four Burghs—at Haddington, afterwards at Edinburgh Of this Court the Chamberlain was convener and president.

1014. The Chamberlain's fees were £200 per annum, to be paid out of the profits of escheats, fines, tolls, and customs accruing to the King out of the burghs. In 1292 the accounts of the Kingdom of Scotland were delivered up to the Chamberlain of Scotland by order of the King of England. The appointment of the Chamberlain passed the Great Seal, but there does not appear to be a commission of older date than the gift by the Duke of Albany, Regent, in 1408, of the office of Chamberlain, to the Earl of Buchan. The Chamberlain was a member of the Privy Council in 1581,[1] and in 1633 there was a revision of the Chamberlain laws.[2] The office of Chamberlain of Scotland had ceased to be exercised before the time of Stair.[3]

SUBSECTION (5).—*The Collector-General.*

1015. The Collector-General is mentioned in the Acts of the Scottish Parliament first in 1581,[4] when he was declared to be a member of the Privy Council. He seems to have been an officer who had some control over the raising of revenue for the King, as we find in 1585 [5] an Act declaring that the Collector is to see that "nothing pass the King's hands or his own that is novel or that may afford a dangerous precedent." In 1587 his presence in person or that of his depute was declared to be necessary during the sittings of the Exchequer.[6] He was present among the Officers of State on the Articles in 1593,[7] and as one of the Privy Councillors who was to be in constant attendance upon the King. The Treasurer, the Comptroller, the Collector, and the Secretary seem, in the end of the sixteenth century, to have been jointly charged with the financial management of the King's affairs, for in 1592 we find an Act of the Scottish Parliament declaring that "The Thesaurer, the Comptroller, the Secretary, and the Collector are to agree" among themselves as to their duties.[8] Later the offices appear to have been conjoined, for in 1644 John, Earl of Lindsay, was appointed "Commissioner for the comptrollery, the collectory and treasury of new augmentations." [9] The office has been in desuetude since the Treaty of Union.

SUBSECTION (6).—*The Comptroller.*

1016. The office of Comptroller is of greater antiquity than that of Collector-General. In 1305 Edward I. appointed Sir Robert Heron to be Comptroller of Scotland.[10] In the early times the expenses of the King's household appear to have been paid by the Comptroller, but he had also duties with regard to the ingathering of the King's rents, for we find it decreed in 1483 that the Master of the King's Household and the Comptroller are to enforce the payment of the King's rents.[11] Later the Comptroller protests on several occasions during the reign of James V. that he is unable to meet the expenses of the King's household. It is on record that in 1542 the Comptroller complained that the

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[1] A.P.S. (Rec. ed.), iii. 229*a*.

[2] *Ibid.*, v. 47.

[3] Stair, iv. 1, 4, 19, 20; Ersk. i. 3, 38; Innes, Scotch Legal Antiq., 76, 96, 114; Crawford, Officers of State, p. 251, "Iter Camerarii," Acts (Rec. ed.), i. 693, etc.; 1469, c. 38; 1491, c. 36; 1503, c. 96, etc.

[4] *Ibid.*, iii. 229*a*.

[5] *Ibid.*, iii. 378*b*.

[6] See EXCHEQUER, Vol. VI. p. 447, *ante*.

[7] A.P.S. (Rec. ed.), iv. 8*a*.

[8] *Ibid.*, iii. 563*a*.

[9] *Ibid.*, vi. 192.

[10] *Ibid.*, i. 120.

[11] *Ibid.*, ii. 165.

Governor's expenses were greater than those of James V., and that the revenue of the Crown was much decreased.[1] During the reign of James VI. of Scotland Parliament was becoming apprehensive of the King's powers of raising revenue, and so the Comptroller was included among those Officers of State who in 1585 were commanded "to see that nothing pass the King's hand or his own that is novel or that may afford a dangerous precedent." The office was combined with that of the Collectory and the Treasury in 1644.

SUBSECTION (7).—*The Master of the King's Household.*

1017. This officer was not included in the list of Officers of State drawn up by James VI., but from time to time he appears in the records among them. He seems to have shared responsibility for the King's finance with the Comptroller. It is on record that in 1333 William de Keith was "Magister hospicii regis," [2] and in 1483 the Master of the King's Household and the Comptroller were ordered to enforce payment of the King's rents.[3] In 1707 the heritable office of Master of the King's Household in Scotland was conferred upon the Duke of Argyll. The Master of the King's Household was also the King's Carver.

SUBSECTION (8).—*The Master of the King's Wardrobe.*

1018. The earliest records relating to the wardrobes of the King and Queen of Scotland are contained in a schedule found among muniments in Edinburgh and sent to Berwick in 1291.[4] Although this officer is not included among the list of Officers of State whose order of precedence was regulated by James VI., he was one of the Officers of State in constant attendance upon the King in 1592.[5] A list of the Crown jewels taken to London by James VI. was contained in the discharge granted to the Earl of Dunbar, Master of the King's Wardrobe. The office has been discontinued since the Union of the Crowns in 1603.

SUBSECTION (9).—*The Master of Requests.*

1019. The Master of Requests was included among the Officers of State whose order of precedence was regulated by the Act of Parliament passed in the reign of James VI. In 1571 he was elected to the Privy Council, and his duties were to receive petitions from the subjects and to remind the Lord Chancellor of affairs of State, depending causes, and supplications in order that the petitions of the people might be laid before the King for his consideration. He was ordered to be in constant attendance on the King in 1593, a member of Parliament in 1603, and on the Articles in 1604. In 1633 his fees were excepted from the general revocation, and in 1641 Sir James Galloway was appointed *ad vitam aut culpam.* With the development of the constitution and parliamentary Government since the Union no trace of the office now remains.

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[1] A.P.S. (Rec. ed.), ii. 424*a*.

[2] *Ibid.*, i. 542.

[3] *Ibid.*, ii. 165.

[4] *Ibid.*, i. 112.

[5] *Ibid.*, iii. 562.

Subsection (10).—*The Marischal.*

1020. The Marischal since early times had been the officer who was responsible for order within the household of the King of Scotland. There was great rivalry between him and the High Constable. In 1641 a committee was appointed to determine the respective duties of the Marischal and the Constable. The servants of the Marischal were allowed to carry arms only on the riding days of Parliament. In 1650 the Marischal was ordered to be present at the coronation,[1] and in 1662 the Knight-Marischal, though not a member, was allowed, as an Officer of State, to stay in Parliament. At the time of the Union the Marischal protested "that the office of the Great Marischal be not prejudiced by the Act of Union." [2]

Subsection (11).—*The Secretary.*

1021. An officer described as the King's Secretary appears as one of the auditors of the Exchequer in 1395.[3] From time to time he is mentioned as an Officer of State, and in 1593 he is mentioned as one of the Officers of State who is to be in constant attendance upon the King. In 1661 the Earl of Lauderdale was appointed sole Secretary of State for Scotland. Later, it appears that it was customary, before the Union, to appoint two Secretaries of State for Scotland, only one of whom had the right to sit in the Scottish Parliament. In 1705 a commission was granted to the Marquis of Annandale as one of the Secretaries of State for Scotland at a salary of £1000.[4] After the Union there were intermittently two Secretaries of State for Scotland until 1746, when the whole responsibility to Parliament for the government of Scotland devolved upon the Lord Advocate. The office of Secretary for Scotland was not revived till 1885.

Subsection (12).—*The Treasurer.*

1022. The Treasurer was an office created by James I. of Scotland when he returned from captivity at the English Court. The charge and management of the King's property was committed to the Treasurer. At some periods there was a Treasurer in addition to a Chamberlain. The precedence of the Treasurer was not fixed by any ancient rule, and there was great rivalry for precedence between the Chancellor and the Treasurer. In the reign of James VI., however, the Treasurer was appointed second Officer of State. Until the end of Charles II.'s reign the Treasurer was appointed "for life," but afterwards the office was bestowed during royal pleasure only. The Treasurer was one of the Officers of State who had to be in constant attendance upon the King.

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[1] A.P.S. (Rec. ed.), vi., pt. ii., 622*a*.

[2] *Ibid.*, xi. 388*a*.

[3] *Ibid.*, i. 581*b*.

[4] *Ibid.*, xi. 210*a*.

In 1685 the Treasury was turned into a commission, and since the Union of the Parliaments the office of Treasurer in Scotland has disappeared, and the financial arrangements for both England and Scotland have been merged in the Government department of the Treasury.

SECTION 3.—OFFICERS OF STATE SURVIVING IN SCOTLAND SINCE 1707.

SUBSECTION (1).—*The Lord Advocate.*

1023. Sir John Ross of Montgrenan, who was with James III. at the battle of Sauchieburn in 1488, but who survived, is the first King's Advocate whose name is known. On the 8th July 1483, when the Duke of Albany failed to appear in answer to a summons of treason, "In the name and behalf of our sovereign lord, John the Ross of Montgrenan, as advocat to his hienes," craved the judgment of Parliament against him.[1] This is the earliest known occasion upon which the King was represented by the Advocate. As early as the reign of Alexander III. it was enacted that no one was to speak in Court except the parties or their advocates,[2] and presumably the King, like other people, availed himself of the services of an advocate, but there is no trace of the idea of the King's Advocate as general representative of the Crown and as public prosecutor until the reign of James VI. The exact date when the office was instituted is not known, but it is believed that it was borrowed from the French, and although it was ordained in 1424 that "leal and wise counsel" should be appointed to assist the poor, there is no trace of the King's Advocate at that date. While fees can be traced as having been paid to the Chamberlain, the Constable, the Chancellor, and the Justiciar from a very early date, the name of the King's Advocate appears first in the public records in 1479 and 1483. At one time it appears as if the Lord Justice-Clerk conducted prosecutions on behalf of the Crown, for the Statute 1436, c. 140, ordained that persons guilty of endangering the safety of crops by setting fire to grass or heath in the neighbourhood shall, if the owner of the land takes no steps to punish them, be indicted by the Justice's Clerk.

1024. At the beginning of the sixteenth century the Advocate becomes a prominent figure in Scottish history. His duties were at no time purely legal. He had extensive political functions as well, and frequently represented the King on diplomatic missions to foreign lands. Although he was not a member of the Privy Council and does not appear until later as an Officer of State, there is good reason to believe that he had a seat in Parliament as "King's Advocate" from a much earlier period. In 1540 Mr Henry Lauder, the King's Advocate, was present in Parliament,[3] and in 1545 it was ordained that the Advocate was to be constantly a member of the Secret Council.[4] The Advocate was in 1567 nominated on a Commission to report on the Articles, and in 1571 he was elected to the Privy Council.

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[1] A.P.S. (Rec. ed.), ii. 151. [2] *Ibid.*, i. 435. [3] *Ibid.*, ii. 368*a*. [4] *Ibid.*, iii. 598*a*.

1025. During the sixteenth century the office gradually increased in importance and the Advocate became public prosecutor and a great Officer of State. In 1568 we find a hint that the Advocate is becoming prosecutor for the King when John Spens of Condie, King's Advocate, prosecutes the Archbishop of St. Andrews and others for treason.[1] Then in 1574 there is an entry in the public records, "the Advocate to take steps for the recovery of Crown lands unlawfully alienated"; and again in 1597 we find "actions for the reduction of usurious bonds and obligations to be pursued with the concurrence of the King's Advocate." That the Advocate has become public prosecutor is expressly implied in the Act of James VI., 1587, c. 77, which authorised the Treasurer and the Advocate to pursue although the private party did not. Prior to 1596 there were usually two King's Advocates at the same time, but in that year the practice ceased and thenceforth it has been customary to appoint only one King's Advocate.

1026. About 1598 the King's Advocate came to be styled "the Lord Advocate" in his capacity as a law officer, the first instance of this mode of address being the trial of Arnot of Woodmiln on 3rd November 1598. As a member of the Scottish Parliament he had been previously styled "Lord" Advocate in common with the other great Officers of State. On several occasions during both the sixteenth and seventeenth centuries questions involving the precedence of the Lord Advocate arose among the Officers of State, and in 1703 the Lords Register, the Advocate, and the Justice-Clerk were entered among "the lesser Officers of State."[2] Charles I. was deprived of the power of appointing the Lord Advocate in common with the other Officers of State in 1641, but the right to appoint the Lord Advocate and the others was restored to the King in 1661.

1027. In 1646 Sir A. Johnstone of Warristoun, one of the Lords of Session, was appointed Advocate to the King and Prince, with a grant of £200 per annum for his services as King's Advocate, the same pension having been enjoyed by Sir Thomas Hope, the King's late Advocate.[3] Under the Commonwealth the King's Advocate became Advocate to the Lord Protector. Sir John Nisbet, who on his appointment as Lord Advocate in 1664 was raised to the bench as Lord Dirleton, was the last person who combined the offices of Lord Advocate and Judge of the Court of Session. During the period between the Restoration and the Revolution the Advocate's office was hated, and many outrages were committed in the name of the law.

1028. The Treaty of Union, followed by the abolition of the Scottish Privy Council, effected a great change in the position of the Lord Advocate. So long as there was a distinct ministry for Scotland, the Lord Advocate shared with six or seven other ministers the responsibilities of government in addition to performing the legal duties peculiar to his office. After the Union, however, the executive government of Scotland was for some years conducted by a Secretary of State for Scotland. The office was not continuously filled, but existed, except at short intervals, until 1746. Thereafter the whole responsibility for Scottish affairs devolved upon the Lord Advocate, and on the rearrangement of the business of the Secretariat in 1782 the Home Office, under the advice of the Lord Advocate, took over Scottish affairs. This position of affairs gave rise to much discontent in Scotland during the nineteenth century, besides imposing an excessive burden of work upon the Lord Advocate, and in 1885 a separate Government department for the management of Scottish affairs was created.

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[1] A.P.S. (Rec. ed.), iii. 47*a*. [2] *Ibid.*, xi. 29*b*. [3] *Ibid.*, vi., pt. i., 614, 837.

1029. Although the Lord Advocate was originally only one of the lesser Officers of State, it became increasingly convenient after the Union for the Crown to sue and be sued through the Lord Advocate, and this is now regulated by the Crown Suits (Scotland) Act, 1857.[1] The Lord Advocate is the proper person to sue or be sued on behalf of any of the public departments,[2] except the Admiralty.[3] Before instituting or defending any such action the Lord Advocate must have the consent of the King or the public department concerned.[4] The position and duties of the Lord Advocate in criminal administration are treated elsewhere.[5]

SUBSECTION (2).—*The Solicitor-General.*

1030. Originally the Solicitor-General was called the King's Solicitor, and he seems to appear first under that title about 1647. In 1705 the Queen's Solicitors were authorised to sit in Parliament.[6] The title "King's Solicitor" may have been borrowed, after the Union of the Crowns in 1603, from England, where the Solicitor-General appeared first in the reign of Edward IV. and represented the King in matters arising in the Chancery. We find that in 1696 the King's Solicitor was authorised to cite defaulters on the public funds.[7] In Scotland, at the present time, the Solicitor-General always appears for the Crown in Exchequer causes.

1031. In the seventeenth and eighteenth centuries there were usually two Solicitor-Generals who acted jointly, but in more recent times the custom has been to appoint one Solicitor-General and four Advocate-Deputes. In the Justiciary Court the Solicitor-General is simply the senior Advocate-Depute. He is mentioned in the letter from the Lord Advocate appointing his deputes, and when he appears in the Justiciary Court he represents the Lord Advocate.

1032. In modern times the Solicitor-General receives a commission from the King which he presents to the Lord President in the Court of

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[1] 20 & 21 Vict. c. 44.

[2] *Ibid.*, s. 1.

[3] Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 4.

[4] See CROWN, Vol. V., s. 7, pp. 329–331.

[5] See CRIME, Vol. V. p. 180, *ante*.

[6] A.P.S. (Rec. ed.), xi. 215*a*.

[7] *Ibid.*, x. 43*b*.

Session, but he takes no oath. He is entitled to sit on the left-hand side of the Bench within the Bar, but this is a right conferred of courtesy and perpetuated by custom. "The Priviledge of sitting or pleading within the Bar [1] was never given to any Solicitor-General till the 1725, that his then majesty King George I. was pleased to give a sign manual for that purpose to Mr Erskine then appointed Sollicitor." The privilege was refused in 1761 to Solicitor-Generals Miller and Garden, but in more recent times it has always been accorded. The Solicitor-General for Scotland is not a member of the Privy Council, but he is a member of the Government.[2]

SUBSECTION (3).—*The Lord Clerk-Register.*

1033. The Lord Clerk-Register has been one of the High Officers of State in Scotland from the earliest times, and is appointed by commission from the Crown under the Great Seal. The earliest commission on record is dated 12th March 1531, appointing the grantee "Clericum Registri Rotulorum et Consilie Supremi Domini Nostri Regis," but there is evidence of the office having already been in existence at a much earlier period. In 1457 the Clerk of Register was one of the Lords of Session.[3] At that time nine of the Lords of the Articles held sessions at Edinburgh, Perth, and Aberdeen to try causes, and the Lord Clerk-Register was one of their number. The holder of the office was originally Clerk of the Scottish Parliament and of the other great Courts and Councils of the nation, and was also Chief Clerk of the Court of Session, and consequently custodian of its processes and of the registers of deeds recorded in its books.

1034. In 1496 the Clerk of Register was appointed Auditor of Causes, and in 1524 the Great Seal, the Privy Seal, and the Quarter Seal were ordered to be delivered to him. In 1540 he was ordered by Parliament to make authentic extracts of Acts passed and to cause them to be printed. By the beginning of the seventeenth century the Clerk-Register was a very important Officer of State with certain rights of patronage, for in 1621 we find that the Clerk of Register is not to present more than three principal Clerks of Session.[4] In 1644 the Chancellor was ordered to deliver up the keys of the charter-house in Edinburgh to the Clerk of Register;[5] and in the same year a warrant was granted to the Clerk of Register to print the public acts of Session with directions for the title-page.[6] In 1650 a trunk with writs came from Orkney to be delivered to the Clerk of Registers,[7] and in 1657 a "receipt was granted by the Clerk of Registers of Scotland to William Ryley, Clerk of Records in the Tower of London for the registers of Scotland, numbering 1609." [8] The Lord Chancellor in 1703 took the oath administered by the Lord Clerk-Register, while the Lord Clerk-Register took the oath administered by the Chancellor.[1] In 1707 the Lord Clerk-Register and two Clerks of Session were ordered to conduct the Peers' election and make the return.[2]

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[1] Letter, Lord Pres. Dundas to Lord Bute, 23rd July 1761, Scot. MSS. Record Office.

[2] See CRIME, Vol. V. p. 182, *ante.*

[3] A.P.S. (Rec. ed.), ii. 47.

[4] *Ibid.*, iv. 695.

[5] *Ibid.*, vi., pt. i., 227.

[6] *Ibid.*, vi., pt. i., 227.

[7] *Ibid.*, vi., pt. i., 573*a*.

[8] *Ibid.*, i. 130.

1035. A large variety of public registers were intrusted to his care by the statutes instituting them, such as the Registers of Sasines and the Adjudication and Inhibition Registers, and "as the King's Great Clerk he was the keeper of all records the custody of which was not otherwise provided for." He had also a general superintendence of the local registers established throughout the country, and issued the volumes employed in their compilation, duly marked by himself or his deputes. Of these, some were returnable, on completion, into the Lord Clerk-Register's department for preservation, while others remained at their local seats. The Lord Clerk-Register in early times had duties to perform in the framing of certain of the records under his charge, but these duties were gradually intrusted to other officials, and the functions of the Lord Clerk-Register came to be confined to those of custody and control.[3]

1036. By the passing of the Lord Clerk-Register (Scotland) Act, 1879,[4] the office has been made almost entirely a titular one. That Act transferred to the Deputy Clerk-Register "the whole rights, authorities, privileges, and duties in regard to the public registers, records, and rolls of Scotland, and the keepers and other officers thereof," formerly vested in the Lord Clerk-Register, reserving to the latter only his status and precedence as an Officer of State, his rights and duties in connection with the election of representative peers of Scotland, and the office of Principal Keeper of the Signet, which had been conjoined with the office of Lord Clerk-Register by statute.[5] No salary is now attached to the office of Lord Clerk-Register.

1037. The office of Deputy Clerk-Register was constituted by Royal Warrant under the Sign Manual, dated 19th June 1806, and appointments to the office were formerly made by commission from the Lord Clerk-Register. Under s. 5 of the Lord Clerk-Register Act, 1879, the appointment was latterly in the gift of the Crown, and the person appointed was to be an advocate of the Scottish Bar of not less than ten years' standing; the salary was fixed at £1200, and by s. 7 there was conjoined with the office that of Registrar-General of Births, Deaths, and Marriages in Scotland. Before the passing of the Act of 1879 the duties of the Deputy Clerk-Register corresponded generally in description and extent with those of the Lord Clerk-Register, and the functions of the latter were in practice mostly discharged by his deputy. By the transference of duties effected under the Act, the Deputy Clerk-Register was made the practical head of the important department of the Public Records of Scotland.[1]

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[1] A.P.S. (Rec. ed.), xi. 36*b*.

[2] *Ibid.*, xi. 426*b*.

[3] See *Campbell*, 1773, Mor. 13531, and *Campbell*, 1795, Mor. 13140.

[4] 42 & 43 Vict. c. 44.

[5] 57 Geo. III. c. 64.

1038. The duties of the Deputy Clerk-Register with regard to the registration of births, deaths, and marriages in Scotland came to an end on the 1st January 1921, when, under the Registrar-General (Scotland) Act, 1920,[2] which repealed s. 7 of the 1879 Act, the Secretary for Scotland was empowered to appoint a Registrar-General of Births, Deaths, and Marriages in Scotland to exercise the functions previously exercised in this respect by the Deputy Clerk-Register.

1039. By the Reorganisation of Offices (Scotland) Act, 1928,[3] the office of Deputy Clerk-Register was abolished. Sec. 5 (1) of the same act provided: "It shall be lawful for the Secretary of State with the consent of the Lord President of the Court of Session to appoint a Keeper of the Registers and Records of Scotland who shall receive out of moneys to be provided by Parliament such salary as the Treasury may fix . . . and there shall be transferred to and vested in such Keeper the whole powers and duties of the Deputy Clerk-Register and of the . . . Keeper of the General Register of Sasines and of the Keeper of the Register of Deeds." It was further provided by the same Act, s. 6, that in the event of a vacancy in the office of Lord Clerk-Register, or in his absence, the Principal Clerk of Session may exercise all the duties of the Lord Clerk-Register in connection with the election of representative peers.

SUBSECTION (4).—*The High Constable.*

1040. The office of High Constable is an ancient office of State and of the Royal Household. The High Constable was in theory the commander of the King's army. The witnessing of charters by the High Constable in the reign of Alexander I. marks the rise of a feudal baronage. He had a jurisdiction extending to all slaughters and riots committed within four miles of the King's person, or of the Parliament or Privy Council, or any general convention of the Estates. Under him were inferior constables, such as the Constable of Haddington, of Dundee, etc., and the Constables of royal castles. The office of High Constable is hereditary in the House of Hay, Earl of Errol, to whose ancestor it was granted by Royal charter in 1315. In 1542 the Earl of Errol, in his capacity of an Officer of State and High Constable, attended in Parliament,[4] and in 1567 a Constable Court was held in Edinburgh.[5] There was in the seventeenth century a good deal of rivalry for precedence between the Marischal and the Constable, and their respective duties were several times regulated by Act of Parliament. The office was reserved in the Heritable Jurisdictions Act of 1747.[1] At the coronation of King Edward VII. the claim of the hereditary Lord High Constable of Scotland to attend, with the right to receive a silver baton tipped with gold at each end and with the arms of the sovereign at one end and his own at the other, was admitted.

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[1] The best account of the early history of the offices of Lord Clerk-Register and Deputy Clerk-Register is to be found in the Second Report of the Courts of Justice Commissioners of 1815, p. 2 *et seq.*; reference may also be made to the Report of the Committee on Land Registration, published in 1898, ss. 7 to 46, and to Mackay's Practice of the Court of Session, i. 147, 148.

[2] 10 & 11 Geo. V. c. 69.

[3] 18 & 19 Geo. V. c. 34, s. 4.

[4] A.P.S. (Rec. ed.), ii. 409*a*.

[5] *Ibid.*, iii. 41.

SUBSECTION (5).—*The Justiciar.*

See JUSTICIARY, HIGH COURT OF, Vol. VIII. p. 595, *ante*.

SUBSECTION (6).—*The Justice-Clerk.*

See JUSTICIARY, HIGH COURT OF, Vol. VIII. p. 599, *ante*.

SUBSECTION (7).—*The Keeper of the Privy Seal.*

1041. This office was copied from the English Court and introduced to Scotland by James I. The Keeper of the Privy Seal was created to relieve the work of the Chancellor, who had the custody of the Great Seal. The affixing of the Privy Seal to any deed became the preliminary to affixing the Great Seal, but in some cases it became itself sufficient sanction of the deed. The office was not abolished by the Treaty of Union, and to-day the Keeper of the Privy Seal in Scotland ranks in precedence immediately after the Secretary of State for Scotland, who is Keeper of the Great Seal.

SUBSECTION (8).—*The Lord Lyon King of Arms.*

See LORD LYON KING OF ARMS, Vol. IX. p. 329, *ante*.

SUBSECTION (9).—*The King's and Lord Treasurer's Remembrancer.*

1042. The King's and Lord Treasurer's Remembrancer is the General Administrator of the Crown Revenues in Scotland; and he represents the former ministerial functions of the Court of Exchequer. Originally the offices of King's Remembrancer and Lord Treasurer's Remembrancer were distinct. They were instituted at the foundation of the Court of Exchequer in Scotland in 1707.[2] The functions of the office of Lord Treasurer's Remembrancer were mainly concerned with the examining and making out annually of the accounts of the several sheriffs, the auditing of the accounts of all clerks of lieutenancy, schoolmasters, constables, and others paid out of the public revenue, and the recording of the accounts of Customs and Excise, the accounts of the Receiver-General with respect to land tax, property tax, and all other taxes paid to him, the account of the Crown agent for criminal business, the accounts of the Solicitor of Exchequer, the accounts of all Chamberlains, Collectors, and Receivers of His Majesty's hereditary land rents in Scotland, and the accounts of the Bishops' rents. The King's Remembrancer had duties in both the Law department and the Treasury department. He considered it to be his duty to look after whatever concerned the revenues or the property of the King in Scotland; and "in case it should appear to him that due attention is not paid to any such matters, it is his duty to represent to the Barons, in order that their Lordships may give their direction thereon." The offices were united in 1836 under the authority conferred on the Barons of Exchequer in 1833.[1] See EXCHEQUER.[2]

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[1] 20 Geo. II. c. 43.

[2] 6 Anne, c. 26, s. 3.

SECTION 4.—OFFICERS OF THE KING'S HOUSEHOLD.

1043. In modern times the officers of the King's Household are as follows: the Lord Chamberlain, the Vice-Chamberlain, the Lords in Waiting, the Lord Steward, the Treasurer, the Comptroller, the Master of the Guard, the Captain of the Gentlemen-at-Arms, and the Captain of the Yeomen of the Guard. Originally these offices were hereditary in certain families, but they have long since ceased to be so. Except with regard to certain privileges claimed by ancient houses at the coronation of the Sovereign, the duties are now performed by persons appointed for that purpose by the Sovereign and chosen from amongst the members, either in the Lords or the Commons, of the party in power. The principal Officers of the Household are generally included in political rearrangements. It is customary for the following officers to retire when their party demits office, viz. the Lord Steward, the Lord Chamberlain, thé Vice-Chamberlain, the Master of the Horse, the Treasurer of the Household, the Comptroller, the Captain of the Corps of Gentlemen-at-Arms, the Captain of the Corps of Yeomen of the Guard, and the Lords-in-Waiting.

SUBSECTION (1).—*The Lord Great Chamberlain of England.*

1044. The office of Lord Great Chamberlain is of great antiquity, and the holder is a high Officer of State. He is Governor of the Palace of Westminster. The Gentleman Usher of the Black Rod and the Yeoman Usher are under his authority. When the King goes to Parliament the Lord Great Chamberlain delivers the Sword of State to any member of the administration whom he chooses, to be borne before His Majesty, he himself walking on his right hand. During the sitting of Parliament he has charge of the House of Lords, and issues tickets of admission on the opening or prorogation of Parliament.

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[1] 3 & 4 Will. IV. c. 13, s. 2.

[2] Vol. VI. p. 447, *ante*. For details of the duties, salaries, management, etc. of the King's and Lord Treasurer's Remembrancer see Sixth and Seventh Reports of the Commissioners appointed for inquiring into the Duties, Salaries, and Emoluments of the Officers, Clerks, and Ministers of Justice of the Courts in Scotland, 1816.

The office is hereditary; and when it falls among heirs-female, they may execute it by a deputy, who must be in degree not inferior to a knight.[1] In 1779 after much litigation the honour was adjudged to belong to the sisters and co-heiresses of the "brave Lord Willoughby" (1555–1601) conjointly, viz. the Lady Willoughby de Eresby and the Marchioness of Cholmondeley, by whose descendants or their deputies its duties have since been alternately discharged. In order of precedence the Lord Great Chamberlain follows next after the Lord Privy Seal.

SUBSECTION (2).—*The Lord Chamberlain of the Household.*

1045. The Lord Chamberlain of the Household is an officer of the Royal Household, next in precedence to the Lord Steward of the Household, and *ex officio* a member of the Privy Council. He is a member of the Government for the time being. He has the superintendence and government of the royal wardrobe, and of the Sovereign's chambers, with the exception of the bed-chamber. He has the government also of the artificers employed in the Queen's service, of the Queen's messengers, comedians, etc. The Queen's chaplains, sergeants-at-arms, physicians, surgeons, apothecaries, etc., are under his inspection. He has a power of licensing theatres (not being patent theatres) in the Metropolis, and also within those places where the Sovereign occasionally resides.[2] A copy of every new play or addition to old play must be submitted to him seven days before it is acted for hire in any theatre in Great Britain.[3] He has the power of disallowing any such play, or part of play, either before or after the expiration of the seven days. He may forbid the acting of any play anywhere when he shall be of opinion that in the interests of good manners, decorum, or the public peace it is fitting to do so.[4] He examines the claims of persons who desire to be presented at Court. He has under him a Vice-Chamberlain, who is also a Privy Councillor.

SUBSECTION (3).—*The Board of Green Cloth.*

1046. This Board, which is part of the Lord Steward's department, consists of the Lord Steward and the Treasurer, Comptroller, and Master of the Royal Household. Its functions are (1) to take the accounts for all the household expenses, and to pay these accounts and the wages of the Royal servants; (2) to see to the good government of the household and servants. The Board was originally the counting-house of the Royal household (*domus computus Hospitii Regis*), and took its name from the green cloth on the table at which its officers sat. In former times it had other functions, which have now become obsolete.

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[1] *Ex parte Burrell*, etc., 1781, 2 Bro. P.C. 146, 8vo ed.

[2] 6 & 7 Vict. c. 68.

[3] *Ibid.*, s. 12.

[4] *Ibid.*, s. 14.

SUBSECTION (4).—*The Clerk of the Crown.*

1047. The Clerk of the Crown in Chancery is an officer of Parliament and of the Lord Chancellor, and is appointed by the Crown. He makes out and issues writs summoning peers, writs of attendance, commissions to summon and prorogue Parliament, commissions to pass Bills, and all other commissions in the House of Lords. He attends in that House, and reads out the titles of the Bills to which the Royal assent is to be signified. He receives and has custody of the returns of elections of Scottish peers, and certifies the same to the House. When a new Parliament is to be summoned, the Clerk of the Crown, on the warrant of the Lord Chancellor, issues writs to the returning officers of the various constituencies. The returns, which are made by a certificate under the hand of the returning officer, are transmitted to the Clerk of the Crown, who thereupon makes up and delivers to the Clerk of the House of Commons a Return Book of the names of the members so returned. On the occurrence of a casual vacancy, whether during session or recess, the Clerk of the Crown issues a new writ upon the warrant of the Speaker of the House of Commons, and, on the return of the writ, sends a certificate thereof to the Clerk of the House. It is his duty to attend the table of the House to amend returns, and to give information when any irregularity arises with reference to returns. In England, but not in Scotland, the ballot papers after an election are transmitted to him for custody. Nearly all patents passing the Great Seal are made out in his office, and, in particular, all patents of creation under the Great Seal are so made. He is registrar of the Lord High Steward's Court of State Trials, and also registrar of the Coronation Court of Claims. The method of publication of Royal Proclamations and the preparation and authentication of documents passing under the Great Seal are regulated by Order in Council.[1]

SECTION 5.—EXISTING OFFICES AND DEPARTMENTS OF STATE.

SUBSECTION (1).—*Introductory.*

1048. The various Government offices and departments through the medium of which the general administration of the country is carried on owe their creation and present internal organisation largely to the direct exercise of the discretionary authority of the Crown as head of the executive. But the constitution of the more modern departments and the powers and duties of the various officers and functionaries of whom their staff is composed, as well in the modern as in the older departments, are now regulated by Act of Parliament or by Orders in Council issued under statutory authority.

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[1] Second Report of Legal Departments Commission, 1874, p. 39; May, Parliamentary Practice, pp. 146, 165, 167, 601; Nicolson on Elections, pp. 197, 239, 255; 35 & 36 Vict. c. 33; 37 & 38 Vict. c. 81.

1049. At the present time the Cabinet is composed of the following members of the Government: the Prime Minister, the Lord Privy Seal, the Lord President of the Council, the Lord Chancellor, the Chancellor of the Exchequer, the Secretary of State for Foreign Affairs, the Secretary of State for Home Affairs, the Secretary of State for the Colonies and Dominions, the Secretary of State for India, and the Secretary of State for War, the Secretary of State for the Air Council, the First Lord of the Admiralty, the President of the Board of Trade, the Minister of Health, the Minister of Agriculture and Fisheries, the President of the Board of Education, the Secretary of State for Scotland, the Minister of Labour, and the first Commissioner of Works. The number of Principal Secretaries of State who may sit as members of the House of Commons has been increased to six by the Secretaries of State Act, 1926.[1] The following Ministers are members of the Government though not of the Cabinet: the Minister of Pensions, the Minister of Transport, the Postmaster-General, the Attorney-General, the Chancellor of the Duchy of Lancaster, the Solicitor-General, the Financial Secretary to the Treasury, the Paymaster-General, the First Civil Lord of the Admiralty, the Junior Lords of the Treasury, the Under-Secretaries of State for the Air Ministry, the Colonial Office, Foreign Affairs, the Home Office, the India Office, the War Office, Scotland, the Lord Advocate and the Solicitor-General for Scotland, and the Parliamentary Secretaries of the Admiralty, Boards of Agriculture, Trade, Education, Health, and of Labour, Pensions, Mines, War, and Overseas Trade.

1050. The relation of master and servant does not exist between superior and subordinate officers of a public department under the Crown. They are all servants of the King, and one of them is not the servant of another. It might be otherwise by statute, but it will not be implied in the absence of explicit words.[2] Incorporation makes no difference to the rule that servants of the Crown cannot be sued in their official capacity.

SUBSECTION (2).—*The Prime Minister.*

See CABINET, THE, Vol. II. p. 536, *ante.*

SUBSECTION (3).—*The Lord Privy Seal.*

1051. This is a purely honorary office since the passing of the Great Seal Act, 1884,[3] which rendered the use of the Privy Seal in all cases unnecessary. It usually confers Cabinet rank on the holder, and has been used to enable a Minister to deal with a particular problem outwith the scope of the existing Government departments, *e.g.* Lord Privy Seal as Minister of Unemployment in the Labour Government of 1929. The office is generally unpaid, but in the case mentioned a salary of £5000 per annum was attached to it.

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[1] 16 & 17 Geo. V. c. 18.

[2] *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178; 15 L.J. K.B. 366; *Roper* v. *Commissioners of Works*, [1915] 1 K.B. 45; 81 L.J. K.B. 219.

[3] 47 & 48 Vict. c. 30.

SUBSECTION (4).—*The Lord President of the Council.*

1052. This Minister is President of the Privy Council.

SUBSECTION (5).—*The Lord Chancellor.*

1053. There has been one Lord Chancellor for Great Britain since 1st May 1707. He is appointed by the Sovereign delivering the Great Seal into his custody and verbally addressing him by his title. No special qualifications are required by law for the tenure of the post, but in practice it is usual to appoint a member of the Bar who holds or has held the office of Attorney-General or Solicitor-General. The Lord Chancellor on his appointment takes the oath of allegiance as well as the official and judicial oaths. He is Speaker of the House of Lords, and receives a salary of £10,000 per annum free of all taxes. The King may grant to any person executing the office of Lord High Chancellor for the time being an annuity not exceeding £5000 free of taxes for life to commence on his resignation or removal from office. The office is held during pleasure, but by established usage the Lord Chancellor retires or accepts office with the party to which he belongs. He takes precedence, if of the degree of baron of Parliament or above, next below the Archbishop of Canterbury.

1054. The Lord Chancellor's duties fall into three divisions—political, administrative, and judicial. He is a member of the Cabinet and the Privy Council, and is Speaker of the House of Lords. He is usually the formal medium of communication between the Sovereign and Parliament. On the meeting of a new Parliament it is his duty in the event of the King's absence to open Parliament. He is Keeper of the Great Seal of the United Kingdom. The cases in which the Great Seal of the United Kingdom, as distinguished from the Great Seal of Scotland or Ireland, is to be used are prescribed by statute.

1055. The Lord Chancellor has many judicial functions as regards England, but his sole judicial function as regards Scotland is as a member of the Supreme Court of Appeal—the judicial committee of the House of Lords.

SUBSECTION (6).—*The Chancellor of the Exchequer.*

1056. The Chancellor of the Exchequer represents the Treasury in the House of Commons and is responsible for the financial policy of the Government. He formulates the demands to be made upon Parliament for the annual sums required to carry on the government of the country, and adjusts the relationship between revenue and expenditure. The "Treasury" means the Commissioners for the time being of His Majesty's Treasury. The Treasury Board consists of the First Lord of the

Treasury (usually in practice the Prime Minister), the Chancellor of the Exchequer, and a varying number of Junior Lords appointed by the Crown on the nomination of the First Lord. The Board does not meet in practice, and the duties of the members, other than the Chancellor of the Exchequer, are political and not financial.

SUBSECTION (7).—*The Secretary of State for Foreign Affairs.*

1057. This Minister presides over the Foreign Office and is assisted by a permanent and a Parliamentary Secretary. In addition there is now a Secretary of the Department of Overseas Trade (Development and Intelligence), appointed by the Foreign Office and the Board of Trade jointly.[1] He exercises the functions of an Under-Secretary to the Secretary of State. The Secretary of State is responsible to the Crown and to Parliament for formulating the Government's foreign policy. He conducts the correspondence with foreign countries, and the diplomatic and consular services are subordinated to his department. In addition to foreign affairs the relations between the Government and semi-independent States, such as Egypt, fall within the purview of the Foreign Office, as well as the relations of British Colonies with foreign States.

SUBSECTION (8).—*The Secretary of State for the Home Department.*

1058. The Secretary of State for the Home Department presides at the Home Office. He is first in precedence among the Secretaries, and all matters which do not fall to other departments are dealt with by him. He is assisted by a Parliamentary and a Permanent Under-Secretary. The Home Office is now concerned almost entirely with England, but the affairs of the Channel Islands and the Isle of Man fall within the scope of the Home Office.

SUBSECTION (9).—*The Secretary of State for the Colonies and the Dominions.*

1059. This Minister presides over the Colonial Office. The degree of control of the Colonial Office varies with the form of Government of the various colonies and dominions. At the present time, in view of the Imperial Conference, a Minister for the Dominions has been appointed in addition to the Minister for the Colonies.

SUBSECTION (10).—*The Secretary of State for India.*

1060. The Secretary of State for India is appointed by the sovereign on the advice of the Prime Minister under powers conferred by the Government of India Act, 1858,[2] as amended by the Government of India Acts, 1915 and 1919 [1] respectively. He acts within the scope of his authority as to matters relating to India with the advice of the Council of India.[2] The Secretary of State for India is assisted by a permanent as well as a Parliamentary Under-Secretary. They are paid salaries of the same amount as the other principal Secretaries of State and Under-Secretaries respectively. The salaries of these Ministers are paid out of the revenues of India.[3]

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[1] Overseas Trade Department (Secretary) Act, 1918 (8 Geo. V. c. 3).
[2] 21 & 22 Vict. c. 106, s. 6.

SUBSECTION (11).—*The War Office.*

1061. This is the department charged with the administration of matters relating to the army and the formulation of the military policy of the Government. Since 1904 the administrative duties have been carried out by the Secretary of State for War and other members of the Army Council, while the executive duties of inspection have been discharged by the Inspector-General of the Forces, assisted by seven subordinate inspectors for different branches of the service. The Army Council is composed of seven members,[4] namely, the Secretary of State for War (President of the Council); first Military Member (Chief of the General Staff); second Military Member (Adjutant-General to the Forces); third Military Member (Quarter-Master General to the Forces); fourth Military Member (Master-General of the Ordinance), Civil member (Parliamentary Under-Secretary of State); Finance Member (Financial Secretary).

1062. The War Office itself is divided into various departments corresponding to the offices of the various members of the Army Council, with the department of the Inspector-General in addition. Each department has a separate permanent staff. The signature of the Council is to be affixed by any two of its members, or by one of them, with the secretary appointed by the Council.[5] The Secretary of State is responsible to the Crown and to Parliament for all the business of his department.

1063. In certain types of action the War Office can sue and be sued in the name of the Secretary of State for War,[6] but it is still doubtful whether he can sue or be sued apart from statute.

1064. The Secretary of State for War is expressly exempted from liability to any fine, penalty, or forfeiture, or to the execution of any diligence against his person or property by reason of anything done or omitted to be done in the execution of the Ministerial duties of his department,[7] or as the result of any action brought by or against him.

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[1] 5 & 6 Geo. V. c. 61, s. 2, and 9 & 10 Geo. V. c. 101, s. 45, Sch. II.

[2] Government of India Acts, 1858 (21 & 22 Vict. c. 106), 1915 (5 & 6 Geo. V. c. 61), 1916 (6 & 7 Geo. V. c. 37), and 1919 (9 & 10 Geo. V. c. 101).

[3] Government of India Act, 1915 (5 & 6 Geo. V. c. 61, s. 2 (3)).

[4] Letters Patent, 6th February 1904; *London Gazette*, 12th February 1904.

[5] Letters Patent, 6th February 1904; *London Gazette*, 12th February 1904.

[6] Defence Act, 1842 (5 & 6 Vict. c. 94), s. 34.

[7] Defence Act, 1860 (23 & 24 Vict. c. 112), s. 43.

1065. The Committee of Imperial Defence is an advisory committee without executive authority. It advises the Government and the departments with regard to questions and general policy. It does not deal with estimates or questions of finance, which are entirely in the hands of the various Ministers and the Chancellor of the Exchequer. The Committee consists of the Prime Minister, the Secretary of State for War, the First Lord of the Admiralty, the heads of the Army General Staff and the Army Intelligence Department, the First Sea Lord of the Admiralty and the heads of the Naval Intelligence Department, to whom are added any persons who may be, from time to time, peculiarly fitted to advise on any problem which may arise.[1]

SUBSECTION (12).—*The Air Council.*

1066. The Air Council was established by the Air Force (Constitution) Act, 1917.[2] The Act provided that the Council was to consist of a Secretary of State as President and other members to be appointed from time to time by Order in Council. At present it is composed of the following members: the President, Parliamentary Under-Secretary of State for Air (Vice-President), Chief of the Air Staff (first and senior Air Member), Air Member for Personnel, Air Member for Supply and Research, and Secretary of the Air Ministry (Secretary of the Council). Two additional members may be appointed by the Secretary of State, who also appoints the other members except the Chief. He is appointed by the King. The distribution of the business of the Council is regulated by Orders in Council.[3] The Air Navigation Act, 1920,[4] extended the purposes of the Air Council so as to include all matters connected with air navigation. Provisions with regard to the Auxiliary Air Force were made by the Auxiliary Air Force and Air Force Reserve Act, 1924.[5] See AIR.[6]

1067. The Air Council may sue and be sued and may for all purposes be described by that name.[7] It is, however, a public department, and the members as agents and servants of the Crown are not liable to be sued on any contract made on behalf of the Crown.[8] Neither will an action for tort lie against the Air Council,[9] which has been held not to be a corporation.[9]

SUBSECTION (13).—*The Admiralty.*

1068. The affairs of the Navy and the Royal Marines are conducted by the Board of Admiralty, which consists of the Commissioners for the time being for executing the office of Lord High Admiral of the United Kingdom, with the addition of a Permanent and of a Parliamentary and

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[1] Parliamentary Debates, 4th Series, vol. cxviii. 291.

[2] 7 & 8 Geo. V. c. 51.

[3] S.R. & O., 1923, No. 1566.

[4] 10 & 11 Geo. V. c. 80.

[5] 14 & 15 Geo. V. c. 15.

[6] Vol. I. p. 257, *ante*.

[7] Air Force (Constitution) Act, 1917, s. 10 (1).

[8] *Rowland and Mackenzie-Kennedy* v. *Air Council*, 1927, L.J. (Ch.) 470.

[9] *Mackenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517.

Financial Secretary. The Commissioners are appointed by patent and consist of the First Lord of the Admiralty, four Naval or Sea Lords, and two Civil Lords. The Admiralty is divided into departments, and the First Lord is a member of the Cabinet and responsible to the Crown and to Parliament for all the business of the Admiralty.[1]

1069. The Admiralty have the power, as trustees for the Crown, to purchase and lease lands for naval requirements, and in addition the Commissioners have certain rights with regard to dockyards, harbours, navigable estuaries, etc.[2] The Admiralty have power to institute actions, suits, or proceedings generally in respect of matters relating to their rights, powers, or duties in respect of property vested in them or under their control,[3] and likewise they can be sued in matters relating to lands under their control. The Admiralty may sue shipowners for the negligent management of a ship.[4] The Admiralty are not, however, liable to be sued except with respect to lands; the remedy (if any) in other cases is by petition of right.

SUBSECTION (14).—*The Board of Trade.*

(i) *General.*

1070. The Board of Trade was originally, and is still in theory, a committee of the Privy Council. But the Harbours and Passing Tolls, etc., Act, 1861,[5] enacts that "The Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations may be described in all Acts of Parliament, deeds, contracts, and other instruments by the official title of the Board of Trade, without expressing their names; and all Acts of Parliament, contracts, deeds, and other instruments wherein they are so described, shall be as valid as if the said Lords, or any of them, had been named therein." The Board of Trade really consists of a President (who is usually a member of the Cabinet), a Parliamentary Secretary,[6] and a Permanent Secretary and staff, but the President is still in theory the President of a committee of the Privy Council for Trade, and on accepting office takes the oath in that capacity, though any such committee has long ago ceased to exist for any practical purpose.

1071. The section of the Act quoted above shews that the Board of Trade was originally a committee "appointed for the consideration of matters relating to trade and foreign plantations," and its duties were confined to collecting and tabulating information on commercial subjects, advising the Foreign Office as to commercial treaties with foreign States, and generally assisting all the departments of State in matters relating to trade and commerce, both by the collection of information and by consulting and advising thereon. One of their most important duties was estimating the food supply of the country and regulating accordingly the export and import of corn. But since 1840 the duties of the Board have been executive and administrative rather than consultative. Owing to the institution of railways and steamships, there arose a necessity for some State department charged especially with the supervision of the safety of the public travelling by land or sea and of railway servants and sailors. This important work naturally fell to the Board of Trade, and their powers and duties under many different Acts of Parliament had, before the War, increased to such an extent as to necessitate division amongst seven different departments, which were distinct from each other, but for all of which the President and Parliamentary Secretary were responsible. These were: (1) the Statistical and Commercial Department; (2) the Railway Department; (3) the Marine Department; (4) the Harbour Department; (5) the Finance Department; (6) the Fisheries Department; (7) the Bankruptcy Department.

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[1] Order in Council of 14th January 1869.

[2] Dockyard Ports Regulation Act, 1865 (28 & 29 Vict. c. 125); Ministry of Transport Act, 1919, s. 2 (1) (ii).

[3] Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3.

[4] *The* "*Etna,*" 1907, 24 T.L.R. 270.

[5] 24 & 25 Vict. c. 47, s. 65.

[6] Appointed in virtue of 30 & 31 Vict. c. 72.

1072. Since the War the functions of the Board of Trade have been to some extent altered by the transfer of the Board's powers and duties with regard to labour questions and railways to the Labour and Transport Ministries respectively, but the main functions of the Board with regard to trade returns and maritime affairs remain.

(ii) *The Statistical and Commercial Department.*

1073. The Statistical and Commercial Department prepares statistical abstracts of the United Kingdom and of the colonies, also statistics as to labour, railways, shipping and navigation, and emigration. It also collected and published statistics of wages, with special reference to hours of labour, the unemployed, the condition of the working-classes, and the prices of commodities. It prepared statistics of trade unions and of strikes. By the Conciliation Act, 1896,[1] the Board of Trade could assist in endeavouring to prevent and settle disputes between employers and workmen, and this power has been used on various occasions. Questions of wages, hours of labour, the condition of the working-classes, statistics with regard to trade unions and strikes, and matters arising under the Conciliation Act have all been transferred to the Ministry of Labour.[2] The Board of Trade edits the *Board of Trade Journal*, which began in 1886, and which deals with tariff and trade notices, post office and quarantine notices, and with periodical returns, such as those relating to corn, cotton, and fishery statistics. The department also prepares returns of tariffs and any matters called for by the Government and Parliament.

(iii) *The Railway Department.*

1074. Formerly the Railway Department had entrusted to it the general supervision of railways and canals and the duty of inspecting new railways, in order to secure the safety of the travelling public. These duties have now been transferred to the Ministry of Transport.[1] Inquiries into the causes of railway accidents are now conducted by the Minister of Transport, and railway rates are fixed by the Railway Rates Tribunal, acting under the Minister of Transport. The control of ports, which formerly belonged to the sphere of the Board of Trade, has been transferred to the Ministry of Transport.

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[1] 59 & 60 Vict. c. 30.

[2] See para. 1089, *infra*.

(iv) *Patents, Companies, Trade Marks.*

1075. By the Patents and Designs Act, 1907,[2] the Patent Office and the Comptroller-General of Patents, Designs, and Trade Marks are under the superintendence of the Board of Trade. The Board have various powers and duties under the Companies Act, 1929,[3] and registrars of companies and their assistants are appointed by them. They have also various powers and duties under the Trade Marks Act, 1905,[4] and the Merchandise Marks Act, 1926.[5]

(v) *The Marine Department.*

1076. The Marine Department has charge, among other matters, of the examination of masters, mates, and engineers in the merchant service, and of the issue of certificates of competency to them, which may be suspended or cancelled; of the whole matters relating to the health or discipline of merchant ships at home or abroad; of tonnage measurement; of the survey of passenger and emigrant ships, and the detention of unseaworthy or overloaded ships; of the rule of the road at sea, ships' lights, and fog-signals, etc.; inquiries into wrecks; and, generally, all questions relating to ships and seamen at home or abroad. This department also co-operates with the Admiralty in the management of the Royal Naval Reserve.

(vi) *The Harbour Department.*

1077. The Harbour Department has charge of the foreshores belonging to the Crown, and the duty of seeing that no injury is done to navigable harbours and channels; of the registry of British ships, wrecks, and salvage; of the examination of private Bills as to their effect on navigation or on the title of the Crown in the foreshore and bed of the sea; of Provisional Orders under the General Pier and Harbour Acts, and any Government questions relating to pilotage in the United Kingdom; and has control over the lighthouse funds of the three general lighthouse authorities of the United Kingdom. There are also various local harbour Acts which confer powers and duties upon this department. See LIGHTHOUSES.[6]

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[1] See para. 1094, *infra*.

[2] 7 Edw. VII. c. 29.

[3] 19 & 20 Geo. V. c. 23.

[4] 5 Edw. VII. c. 15.

[5] 16 & 17 Geo. V. c. 53.

[6] Vol. IX. p. 242, *ante*.

(vii) *The Finance Department.*

1078. The Finance Department has charge of the accounts of the Board of Trade; of the three Lighthouse Boards; of colonial lighthouses; of mercantile marine offices; and of receivers of wreck. It also administers the merchant seamen's fund; pensions to merchant seamen; seamen's savings banks; their wages and effects; and relief of distressed seamen. It also examines and presents to Parliament the accounts of life assurance companies.

(viii) *The Fisheries Department.*

1079. The Fisheries Department administers the Salmon and Sea-fishery Acts for England; but in Scotland the corresponding powers and duties fall to the Fishery Board (see FISHING).[1]

(ix) *The Bankruptcy Department.*

1080. The Bankruptcy Department of the Board of Trade was instituted by the Bankruptcy Act, 1883. The head of this department is the Inspector-General in Bankruptcy. Under this Act the Board of Trade appoint "official receivers" of debtors' estates, and such receivers act under the general authority and direction of the Board of Trade. But the provisions of the Act do not apply to Scotland.

(x) *The Census of Production.*

1081. The Census of Production Act, 1906,[2] provides for the taking of a periodical census of production, beginning in the year 1908, and subsequently at such intervals as may be determined by the Board of Trade as soon as practicable after the taking of the first census. The Board of Trade is constituted the central authority for taking this census; and the expenses are to be paid out of money provided by Parliament. A Census of Production Office, under a director, was established, and in 1918, when the Statistical Department was recreated after the War as a separate entity, the Census of Production Office was attached to that Department. In 1925 a census of production was taken with regard to production in 1924.

1082. During the War an interesting experiment was initiated to establish regular means of contact between the heads of the principal departments of the Board of Trade, and also between the President and the Secretaries by organising meetings at regular intervals to settle questions of policy. These meetings were definitely organised in 1919 into a Board of Trade Council, and an attempt is still made to hold these Council meetings once a week. In addition there has been established of late years the post of "Chief Economic Adviser." Two appointments have up to the present (1930) been made, and in each case a retiring Permanent Secretary has been appointed. The duties of the post are advisory, and have been so far mainly concerned with international and inter-imperial economic relations.

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[1] Vol. VII. p. 109, *ante*.

[2] 6 Edw. VII. c. 49.

1083. The growth of Board of Trade responsibilities, and particularly the association with the Board of quasi-independent departments such as the Departments of Mines and Overseas Trade, necessitated an increase in the number of Parliamentary Secretaries. At present the number is three.

(xi) *The Mines Department.*

1084. This is a department of the Board of Trade. It was established first under the Mining Industry Act, 1921, s. 1.[1] It is in the charge of a Parliamentary Secretary, and all matters relating to mines and the enforcement of statutes regulating the hours and manner of working in mines have been transferred to it by the said statute.

(xii) *The Department of Overseas Trade.*

1085. This department was created in 1917. It is jointly responsible to the Foreign Office and the Board of Trade. It has power to carry on the work of collecting and disseminating commercial intelligence to traders in this country and to administer the commercial services abroad whether within the Empire or in foreign countries. It is in the charge of a Parliamentary Under-Secretary.

SUBSECTION (15).—*The Ministry of Agriculture and Fisheries.*

1086. The Ministry of Agriculture and Fisheries was created by Act of Parliament, namely, the Ministry of Agriculture and Fisheries Act, 1919,[2] in substitution for the Board of Agriculture. It is concerned with agricultural matters in England and Wales. The Minister has power to appoint two paid secretaries, one of whom may be a Member of Parliament.

SUBSECTION (16).—*The Board of Education.*

1087. The Board of Education is charged with educational matters in England and Wales, and consists of a President, the principal Secretaries of State, the First Commissioner of the Treasury, and the Chancellor of the Exchequer. The Board may sue and be sued as, and in the name of, the Board of Education, and it has an official seal.

SUBSECTION (17).—*The Ministry of Health.*

1088. The Ministry of Health was established by the Ministry of Health Act, 1919.[3] It is charged with all matters concerning health in England and Wales. The Minister may appoint one Parliamentary Secretary and such secretaries and officers as he shall consider necessary, subject to the consent of the Treasury. The Minister has an official seal, and he may sue and be sued by the name of the Minister of Health.

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[1] 10 & 11 Geo. V. c. 50.

[2] 9 & 10 Geo. V. c. 91.

[3] 9 & 10 Geo. V. c. 21.

SUBSECTION (18).—*The Ministry of Labour.*

1089. The Ministry was established in 1916.[1] The department is in the charge of a Minister who is entitled to have an official seal, and who may appoint such secretaries, officers, and servants as he may determine. The Minister is entitled to sit in Parliament, but not more than one of his secretaries shall at one and the same time be a member of the House of Commons. On the institution of the Ministry of Labour certain functions of the Board of Trade were transferred to it, *videlicet*: all matters falling under the Conciliation Act, 1896, Labour Exchanges Act, 1909, Trade Boards Acts, 1909, and National Insurance (Unemployment) Acts, 1911–1916. The Labour Ministry is now concerned with all questions of trade and employment which affect the domestic relations between employer and employee, such as the hours of employment, standard of wages, conditions of work, etc., and the Minister of Labour is represented at the conferences of the International Labour Office of the League of Nations.

SUBSECTION (19).—*The Commissioners of Works.*

1090. The Commissioners of Works and Public Buildings comprise a First Commissioner appointed by royal warrant under the sign manual and holding office during pleasure, together with the six principal Secretaries and the President of the Board of Trade, who are *ex officio* Commissioners. The First Commissioner is a member of the Cabinet, and the *ex officio* Commissioners are invariably members of the Ministry. They have the care and maintenance of certain public buildings, and certain duties formerly discharged by the Commissioners of Woods in relation to certain royal parks and gardens are now in their control. They have power to appoint architects, surveyors, and officers of a similar character, but the secretary, clerks, messengers, and other officers of the department are appointed by the Treasury, subject to dismissal by the Commissioners of Works.

1091. The Office of Works is the department charged with responsibility for the protection of ancient monuments, and they may make the necessary orders for the protection thereof and appoint Commissioners of Ancient Monuments under and in virtue of the provisions of the Ancient Monument Consolidation and Amendment Act, 1913.[2] See ANCIENT MONUMENTS.[3]

SUBSECTION (20).—*The Ministry of Pensions.*

1092. The Minister of Pensions was appointed under the Ministry of Pensions Act, 1916,[4] which established a Government Department to take over the powers and duties of the Admiralty, the Commissioners of the Royal Hospital for Soldiers at Chelsea, and the Army Council and War Office with respect to pensions to those who have been employed in His Majesty's service. The Minister has a seal of office, and he may sue or be sued in the name of the "Minister of Pensions." The Minister and one secretary may be members of the House of Commons.

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[1] 6 & 7 Geo. V. c. 68.

[2] 3 & 4 Geo. V. c. 32.

[3] Vol. I. p. 319, *ante*.

[4] 6 & 7 Geo. V. c. 65.

1093. Under the War Pensions Act, 1921,[1] the Minister was given power to make schemes for the establishment of war pensions committees in each district. The functions of the committees are set forth in s. 2 of the Act, and they are exercised subject to and in accordance with the regulations of the Minister. In addition to the local committees there is a central advisory committee (s. 3). Wide discretionary powers with regard to review and commutation of pensions are in the hands of the Minister. The Minister has power to make regulations with regard to final awards, subject to the claimants' right of appeal to the Pensions Appeal Tribunal. The method of procedure in regard to appeal to the Pensions Appeal Tribunal is regulated under s. 6, and the limit of time during which application might be made for a pension was fixed, under s. 5, at seven years from the date of his discharge or from the date of the termination of the War, 31st August 1921, whichever date was the earlier. This rule has now been relaxed.

SUBSECTION (21).—*The Ministry of Transport.*

1094. The Ministry of Transport was created by the Ministry of Transport Act, 1919.[2] The department is under the control of the Minister, who may appoint such secretaries and officers as he may think fit, subject to the consent of the Treasury. He and one secretary are in the Government, and they may be members of the House of Commons. He has an official seal, and he may sue or be sued by the name of the "Minister of Transport." He "shall be responsible for the acts and defaults of the officers and servants and agents of the Ministry in like manner and to like extent as if they were his servants, and costs may be awarded against the Minister."[3]

1095. All powers and duties of any Government Department in relation to (*a*) railways; (*b*) light railways; (*c*) tramways; (*d*) canals, waterways, and inland navigation; (*e*) roads, bridges, and ferries, and vehicles and traffic thereon; (*f*) harbours, docks, and piers—were, in terms of s. 2, transferred to this department. There are two committees to advise the Minister, a Rates Advisory Committee and a Road Advisory Committee. These are appointed in terms of ss. 21 and 22 respectively of the 1919 Act. In addition the Minister is entitled under s. 23 to set up a panel of experts and persons of wide commercial and trading experience appointed from nominees after consultation with the various interests concerned, and of labour, trading interests, local authorities, and such other interests as the Minister may deem desirable.

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[1] 11 & 12 Geo. V. c. 49.

[2] 9 & 10 Geo. V. c. 50.

[3] Ministry of Transport Act, 1919, s. 26.

1096. In Scotland the Minister of Transport cannot impose conditions involving expense upon any local authority without its consent or the consent of the Secretary of State for Scotland.[1]

SUBSECTION (22).—*The Post Office.*

1097. The Postmaster-General[2] is appointed by letters patent under the Great Seal. He is the responsible head of the Post Office both as regards administration and in Parliament. He is a body corporate with a seal for the purpose of holding lands and transmitting them to his successors in office, in trust for the Crown. He has power with the consent of the Treasury[3] to purchase, sell, and exchange land. The Postmaster-General is not responsible for the delicts of his servants.[4]

SECTION 5.—SCOTTISH DEPARTMENTS.

SUBSECTION (1).—*The Secretary of State for Scotland.*

1098. From the date of the Union until 1746 there was a Secretary of State for Scotland, but thenceforward, until 1885, the connection of Scotland with the central Government was maintained chiefly through the Home Office. The office of Secretary for Scotland was, however, again created by the Secretary for Scotland Act, 1885, and his duties and powers defined by the Secretary for Scotland Acts, 1885 and 1887.[5] A salary of £2000 a year was given, and power to appoint "such permanent secretaries, inspectors, clerks, and other officers as he may, with the sanction of the Treasury, determine" (s. 2). He may sit in Parliament (s. 3), and is entitled to the custody of the official seal, granted to Scotland in place of the Great Seal by the Treaty of Union, and to the style and title of "the Secretary for Scotland" (s. 4). By the Secretaries of State Act, 1926,[6] the status of a Secretary of State was conferred upon the Secretary for Scotland, and in consequence his salary was raised from £2000 to £5000 per annum.

1099. The powers of the Secretary for Scotland are now many, and are created by a considerable number of Acts of Parliament. They include powers with regard to reformatories and industrial schools under the Children Act, 1908.[7] Under the Ministry of Transport Act, 1919,[8] the Ministry has no power to impose expenditure upon local government authorities in Scotland without the consent of the Secretary of State for Scotland.

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[1] Ministry of Transport Act, 1919, s. 24.

[2] Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (11).

[3] Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 3; Post Office (Sites) Act, 1885 (48 & 49 Vict. c. 45); Post Office Act, 1908 (8 Edw. VII. c. 48), ss. 45 and 46.

[4] *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178.

[5] 48 & 49 Vict. c. 61; 50 & 51 Vict. c. 51.

[6] 16 & 17 Geo. V. c. 18.

[7] 8 Edw. VII. c. 67, s. 132 (1).

[8] 9 & 10 Geo. V. c. 50, s. 24.

1100. Under the Reorganisation of Offices Act, 1928,[1] the Scottish Board of Health, the Board of Agriculture and Fisheries, and the Prison Commissioners for Scotland were abolished, and the Department of Health for Scotland, the Department of Agriculture for Scotland, and the Prisons Department respectively were substituted in their stead. These departments are under the control of the Secretary of State for Scotland, who has power, with the consent of the Treasury, to appoint such secretaries, servants, and other officers as he may determine. The offices are to be situated in Scotland, and all the property formerly held in trust for the said Boards passed to the respective departments as from an appointed day specified in the said Act of Parliament. The departments are corporate bodies, with official seals, and they may sue and be sued in the name by which they are respectively described in the Act of Parliament.

SUBSECTION (2).—*The Department of Health for Scotland.*

1101. The functions of the Board of Health were transferred to this department under the Reorganisation of Offices Act, 1928. The Board was established under the Scottish Board of Health Act, 1919,[2] for the purpose of promoting the health of the people of Scotland. The Board had general powers to take any steps considered necessary with regard to the improvement of the health of the people. Under the same Act of Parliament the constitution of the Board is specified, but the Department is now staffed by the Secretary of State for Scotland, who has power to make the necessary appointments.

1102. The following powers are now exercised by the Department for Health:—

(1) All the powers and duties formerly exercised by the Local Government Board for Scotland;
(2) all the powers and duties of the Scottish Insurance Commissioners;
(3) all the powers of the Privy Council and the Lord President of the Council under the Midwives (Scotland) Act;[3]
(4) all the powers and duties exercised by the Secretary for Scotland under the Alkali, &c. Works Regulation Act, 1906;[4]
(5) all the powers and duties of the Secretary for Scotland under the Burial Grounds (Scotland) Act, 1855;[5]
(6) all the powers and duties of the Secretary for Scotland under the Rivers Pollution Prevention Acts, 1876[6] and 1893,[7] s. 55 of the Local Government (Scotland) Act, 1889,[8] and the Rivers Pollution, Prevention (Border Councils), Act, 1898;[9]
(7) all the powers and duties of the Secretary for Scotland under the Births, Deaths, and Marriages (Scotland) Acts, 1854–1910,

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[1] 18 & 19 Geo. V. c. 34.
[2] 9 & 10 Geo. V. c. 20.
[3] 5 & 6 Geo. V. c. 91.
[4] 6 Edw. VII. c. 14.
[5] 18 & 19 Vict. c. 68.
[6] 39 & 40 Vict. c. 75.
[7] 56 & 57 Vict. c. 32.
[8] 52 & 53 Vict. c. 50.
[9] 61 & 62 Vict. c. 34.

the Marriage Notice (Scotland) Act, 1878, and the Vaccination (Scotland) Acts, 1863–1907;

(8) all the powers and duties of the Secretary for Scotland and the Highlands and Islands (Medical Service) Board under the Highlands and Islands (Medical Service) Grant Act, 1913;[1]

(9) all the powers and duties of the Scottish Education Department with respect to the medical inspection and treatment of children and young persons. In matters relating to the health of school children the department acts in collaboration with the Scottish Education Department.

1103. The Local Government Board for Scotland was created by the Local Government (Scotland) Act, 1894.[2] It succeeded to the powers and duties of the Board of Supervision, abolished by the same section, and all references in Acts of Parliament, contracts, deeds, etc., to the Board of Supervision are to be construed as references to the Local Government Board for Scotland (s. 7). "The Board of Supervision for relief of the poor in Scotland" was established by the Poor Law (Scotland) Act, 1845.[3] In addition to its duties under the Poor Law Act, the Board was further intrusted with the enforcement of the Vaccination Act,[4] with the oversight of sanitary administration,[5] and with duties as to the regulation of dairies.[6] The powers and duties of the Board are now vested in the Department of Health for Scotland.

1104. The following is a brief summary of the duties formerly carried out by the Local Government Board for Scotland:—

Under the Local Government (Scotland) Act, 1889,[7] the Board gave express consent to the appointment of any sanitary inspector who had not been for three years a sanitary inspector under the Public Health Acts, and every medical officer and every sanitary inspector was removeable from office only with the sanction of the Board (s. 54). The Board might require medical officers and sanitary inspectors to send them reports (s. 53).

1105. Under the Local Government (Scotland) Act, 1894,[8] (*a*) the Local Government Board was intrusted with the duty of bringing the Act into operation, whereby parish councils were elected in place of the former parochial boards, and it was required to exercise continued supervision over the working of the Act. The Board made rules as to the manner in which parish councils were to keep accounts, and publish them, and make payments (ss. 35, 30). It also appointed auditors, made rules for audit, and decided on surcharges (s. 36). In the case of parish trusts, the Board exercised supervision as to the expediency of the parish council appointing trustees, and as to the number of such trustees. It also prescribed the method of keeping and publishing the accounts of any property held as a parish trust, including churchyards transferred to the parish council (s. 30). The Board's consent was required to the sale or exchange by parish councils of heritable property transferred by the Act from parochial boards (s. 48). When a rural parish council or a landward committee desired to acquire land, and could not do so by agreement, the Board's confirmation was required of any order taking land compulsorily. Land so acquired could not be sold, exchanged, or let for longer than a year without the Board's consent (s. 24 (2)). The Board exercised similar functions, under s. 26, when a parish council desired to lease land compulsorily for allotments or common pasture.

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[1] 3 & 4 Geo. V. c. 26.

[2] 57 & 58 Vict. c. 58, s. 3.

[3] 8 & 9 Vict. c. 83, s. 2.

[4] 26 & 27 Vict. c. 108, ss. 5 and 27.

[5] 30 & 31 Vict. c. 101.

[6] 49 & 50 Vict. c. 32, s. 9.

[7] 52 & 53 Vict. c. 50.

[8] 57 & 58 Vict. c. 58.

1106. Under the Local Government (Scotland) Act, 1908,[1] trustees of hospitals or sanatoria might, with the sanction of the Board, transfer them, together with any endowments thereof, to local authorities constituted in terms of s. 66 of the Public Health (Scotland) Act, 1897, to be used by them for the purposes of the said section. Where in any special district formed under s. 44 of the Local Government (Scotland) Act, 1894, the produce of the district rate was not sufficient to meet the expenditure, the county council might increase the rate to such extent as may be approved by the Board.

1107. The supervision of parish councils in administering poor relief under the Poor Law (Scotland) Acts was the most important branch of the Board's work, the leading enactment being the Poor Law (Scotland) Act, 1845.[2] This branch still forms a most important section of the Department's work.[3]

1108. The Board was vested with general powers of inquiry into the management of the poor, having power to call for returns, to examine persons on oath, and to call for documents.[4] It might authorise special inquiries to be made by one of its members, or by a commissioner, and it might appoint superintendents of the poor in any districts.[5] The Board might allow expenses to witnesses, and penalties were incurred by disobedience to its summons or order.[6] Any member of the Board, or the secretary, or a servant of the Board duly authorised, might attend meetings of parish councils.[7] Its approval was required to any alteration of the dates of the statutory meetings for revising the roll of paupers.[8] The Board fixed the form of notices,[9] and might require returns from parish councils as to funds vested in them by gift, mortification, or bequest for the poor.[10]

1109. The inspector of poor in each parish had to obey the Board's instructions,[11] and the Board might suspend or dismiss him for neglect of duty or incompetency.[12] The practical effect of these provisions was that he could be removed from office only by the Board.[1] For instance, a parish council was not entitled, without the Board's consent, to dismiss an inspector indirectly by reducing his salary.[2] The Board's approval was required to the erection of poorhouses by parishes singly or in combination, to the withdrawal of any parish from the combination, to the plans of the building, to the regulations for its management, and to the rates to be charged to outside parishes.[3] The Board had the power of removing the poorhouse medical officer for incompetency or neglect,[4] and he could not be dismissed without their consent.[5]

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[1] 8 Edw. VII. c. 62.

[2] 8 & 9 Vict. c. 83.

[3] Cf. *Colville* v. *The Parish Council of the Parish of Dalziel*, 1927 S.L.T. 118; and the Poor Law Emergency Provisions (Scotland) Act, 1927 (17 & 18 Geo. V. c. 3).

[4] 8 & 9 Vict. c. 83, s. 9.

[5] *Ibid.*, ss. 10, 11, and Poor Law Act, 1856 (19 & 20 Vict. c. 117).

[6] 8 & 9 Vict. c. 83, ss. 12, 13.

[7] *Ibid.*, s. 15.

[8] *Ibid.*, s. 30.

[9] *Ibid.*, s. 90.

[10] *Ibid.*, s. 53.

[11] *Ibid.*, s. 55.

[12] *Ibid.*, s. 56.

1110. If an applicant considered the relief granted to him by the parish council inadequate, he could complain to the Board, who might declare by minute that he had just cause of action against the parish, and if so, he was entitled to the benefit of the poor's roll in the Court of Session.[6] In the case of *Cuthill* v. *Parish Council of Inverkeillor*,[7] the Board held that in the circumstances of the case an offer of the poorhouse was not adequate relief, and granted a minute of just cause of action, and this was approved by the Court.

1111. If a parish council refused to do what was required of them, or in case any obstruction should arise in the execution of the Act the Board might apply to the Court of Session by petition.[8] The Board might call for returns of all trust moneys vested in parish councils for relief of the poor,[9] and the kirk-session of every parish had to report annually to the Board "as to the application of the moneys arising from church collections." [10]

1112. By the Poor Law (Scotland) Act, 1898,[11] it was enacted that where two or more parish councils "have differed as to the settlement of a poor person, but are agreed as to the facts on which such settlement depends," they might "refer the case for determination by the Local Government Board, whose determination shall be final" (s. 2). Many arbitrations under this section took place annually, and will be found reported in the Poor Law Magazine and in Graham's Poor Law. By ss. 3 and 5 appeal might be made to the Board by a pauper against removal to another parish in Scotland.

1113. Under the Public Health (Scotland) Act, 1897,[12] the Board was declared to be the central authority for the execution of the Act, (s. 5), and it supervised the control of public health by county and town councils and district committees. The Board had power to inquire into the sanitary conditions of a district, and to order special inquiries to be held (ss. 7–11). If a parish or burgh was situated in more than one county, the Board might determine in which of such counties it should be held to be situated for the purposes of the Act, and the jurisdiction of magistrates, justices, and sheriffs should be regulated accordingly (s. 13). No medical officer or sanitary inspector could be removed without the sanction of the Board. The registrar of births, deaths, and marriages in each district had to furnish such returns as might be required of him by the Board (s. 15). A licence by the local authority was required for carrying on the business of slaughtering of cattle, and if refused, appeal might be taken to the Board. The Board might deal with any nuisance created by a local authority in the removal of refuse (s. 37), and might require the local authority to provide premises for disinfecting (s. 46), and hospitals for infectious diseases, of which the plans must be approved by the Board (s. 66). Such approval might be conditional upon certain things being done.[1] The Board might require local authorities to make by-laws as to lodging-houses (s. 72), and it had large general powers to make regulations to prevent the spread of epidemics (ss. 78–88). It decided on all objections by parties affected by any proposed sewer (ss. 105, 106), and its approval was required to the construction of any outfall-sewer beyond the district of the local authority (s. 28). The Board's sanction was required where local authorities desired to combine as to sewerage (s. 121) or waterworks (s. 130), and its recommendation was necessary to obtaining loans from the Public Works Loan Commissioners (s. 142). The Board might constitute port sanitary authorities and arrange for their proceedings (ss. 172–175). It controlled local authorities in the acquisition and alienation of lands, and might authorise the compulsory taking of land, subject to appeal to Parliament (ss. 144, 145). The Board's confirmation was required to by-laws made under the Act (s. 185); and to by-laws under the Burgh Police Act, 1892 (s. 318), relating to sanitary matters; and also to by-laws made for special districts formed under the Local Government Act, 1894, s. 44. Penalties were exigible for violating its directions and regulations (s. 163). It was not liable for the irregularities of its officers (s. 166). The Board had power to enforce the Act by summary petition to the Sheriff (s. 146) or to the Court of Session (s. 147). Mere failure to deal with a nuisance of which the local authority was aware justified the Board in presenting a summary petition to the Court of Session for an order to execute the necessary works.[2] The Court allowed the local authority reasonable time to remedy the nuisance;[3] but when the local authority had been induced to act only after the presentation of the petition, the Board was entitled to expenses.[4] Conditions might be imposed by the Board in giving a valid approval of a proposal by a local authority to erect a temporary hospital.[1] But what the Board required must be clearly within the limits of the local authority's statutory powers.[2]

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[1] Per Lord President in *Board of Supervision* v. *Parish of Dull*, 1855, 17 D. 827, and per Lord Shand, Ordinary, in *Clark* v. *Board of Supervision*, 1873, 1 R. 261.

[2] *Board of Supervision* v. *Parochial Board of Old Monkland*, 1880, 7 R. 469.

[3] 8 & 9 Vict. c. 83, ss. 60, 61, 63, 64, 65.

[4] *Ibid.*, s. 66.

[5] *Kilwinning Parish Council* v. *Board of Management of Cunninghame Combination Poorhouse*, 1909 S.C. 829.

[6] 8 & 9 Vict. c. 83, ss. 74, 75.

[7] 1910 S.C. 206.

[8] For instances of such petitions, see *Board of Supervision*, 1850, 12 D. 627; 1855, 17 D. 827; 1880, 7 R. 469.

[9] 8 & 9 Vict. c. 83, s. 53.

[10] *Ibid.*, s. 54.

[11] 61 & 62 Vict. c. 21.

[12] 60 & 61 Vict. c. 38.

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[1] *Mags. of Edinburgh* v. *Mags. of Leith*, 1896, 23 R. 383.

[2] *Board of Supervision* v. *Local Authority of Montrose*, 1872, 11 M. 170; *Board of Supervision* v. *Local Authority of Lochmaben*, 1893, 20 R. 434.

[3] *Board of Supervision* v. *Local Authority of Montrose*, *supra*.

[4] *Board of Supervision* v. *Local Authority of Pittenweem*, 1874, 1 R. 1124.

1114. Under the Vaccination (Scotland) Act, 1863,[3] the Board was empowered to make regulations, to which parish councils had to conform, and it had the same powers of enforcing them as under the Poor Law Acts. The Board might also perform any duty which the parish council was neglecting (ss. 5, 5, 12, 27). These provisions were not affected by the Vaccination (Scotland) Act, 1907.

1115. Under the Sale of Food and Drugs Acts, 1875 to 1907,[4] analysts of all articles of food and drugs are appointed by the local authority, but their appointment and removal was subject to the approval of the Board.[5] Every manufactory of margarine had to be registered in such manner as the Board might direct.[6] The Board might in certain circumstances direct an officer of their own to procure articles of food for analysis.[7] Powers and duties under the Acts were transferred from the Secretary for Scotland to the Local Government Board for Scotland.[8] Any officer of the Board might enter premises registered under the Acts and inspect the process of manufacture.[9] The Board might make regulations for prohibiting the use of any substance as a preservative of butter or margarine.[10]

1116. Under the Diseases of Animals Act, 1886,[11] the Board was vested with the power conferred on the Privy Council[12] of making orders relative to dairies, cow-sheds, and milkshops.

1117. Under the Infectious Diseases Notification Act, 1889,[13] the Board prescribed the form of certificates (s. 4), and its approval was required for the making, varying, or revoking of any order extending the definition of "infectious disease" (s. 7).

1118. Under the Housing Acts various powers and duties were exercised by the Local Government Board. The statute now in force is the Housing (Scotland) Act, 1925,[14] and the existing powers of the central authority under that Act have been elsewhere treated.[15]

1119. Under the Cleansing of Persons Act, 1897,[16] the sanction of the Board was required for the erection by the local authority of buildings for the purposes of the Act (s. 3).

1120. Under the Unemployed Workmen Act, 1905,[17] there were established by the Board distress committees for the relief of the unemployed in large towns (s. 2). The Board might by order provide for the constitution and proceedings of such committees, and for the audit of their accounts (s. 4). But it has been held that the allocation of expenses under the Act could not be affected by provisions for audit made by the Board.[1]

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[1] *Mags. of Edinburgh* v. *Mags. of Leith*, 1896, 23 R. 383.

[2] *Local Government Board of Scotland* v. *Elgin County Council*, 1897, 24 R. 512.

[3] 26 & 27 Vict. c. 108.

[4] The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63); the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30); the Margarine Act, 1887 (50 & 51 Vict. c. 29); the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51); the Butter and Margarine Act, 1907 (7 Edw. VII. c. 21).

[5] Sec. 10, Act of 1875.

[6] Sec. 9, Act of 1887.

[7] Secs. 2, 3, Act of 1899.

[8] Sec. 24, Act of 1899.

[9] Sec. 2, Act of 1907.

[10] Sec. 7, Act of 1907.

[11] 49 & 50 Vict. c. 32, s. 9.

[12] 41 & 42 Vict. c. 74, s. 34.

[13] 52 & 53 Vict. c. 72.

[14] 15 Geo. V. c. 15.

[15] See Housing and Slum Clearance, Vol. VII. p. 632, *ante*.

[16] 60 & 61 Vict. c. 31.

[17] 5 Edw. VII. c. 18.

1121. Under the Notification of Births Act, 1907,[2] a local authority might, with consent of the Board, resolve to adopt the Act for the immediate notification to the medical officer of health of the birth of every child. The Board might, if it thought expedient, by order declare that the Act should be in force in the area of any local authority who had power to adopt the Act and who had not done so (ss. 2, 3).

1122. Under the Children Act, 1908,[3] the Board, for the purposes of Part I. of the Act, had the same powers of making inquiries, calling for returns, and applying to the Court of Session as they had for the purposes of the Poor Law (Scotland) Act, 1845 (s. 132 (2)). Part I. of the Act deals with "infant life protection," and the powers and duties connected therewith were entrusted to parish councils. This provision therefore empowered the Board to see that parish councils performed their duties under that part of the Act of 1908. If the Board gave their approval, a parish council might subscribe to the funds of an association or society for the prevention of cruelty to children (s. 132 (20)). By s. 122 (3) education authorities were entitled to use any premises provided by any sanitary authority for cleansing the person or clothing of persons infested with vermin, and in default of agreement, the Board was to settle the amount to be paid to the sanitary authority (s. 122 (3)).

1123. Under the Old Age Pensions Act, 1908,[4] the Board was constituted "the central pension authority" (s. 8). Appeals might be taken to it against decisions of the local pension committees, and the Treasury in conjunction with the Board was to make regulations for carrying the Act into effect (s. 10).

1124. Under the National Insurance Act, 1911,[5] one of the benefits conferred by the Act upon insured persons was treatment for tuberculosis "or such other diseases as the Local Government Board with the approval of the Treasury may appoint" (s. 8 (*b*)). Such treatment might be in institutions approved by the Board, or if otherwise it must be "in a manner" approved by the Board (s. 16 (1)). Any grant by Parliament in aid of such institutions was to be distributed by the Board with the consent of the Treasury. The Board might authorise a county council to provide such an institution, and for the purpose of facilitating co-operation amongst county councils and other local authorities (not being poor law authorities) might by order make provision for joint committees, joint boards, or otherwise for the joint exercise of powers for the supply of such institutions (s. 64). In cases of excessive sickness, there might be an inquiry as to whether such sickness had been due to neglect by any employer or individual or local authority, and application might be made "to the Secretary of State or the Local Government Board, as the case may require, for an inquiry, and thereupon the Secretary of State or Local Government Board may appoint a competent person to hold an inquiry" (s. 63 (1)). The person holding the inquiry had power to order payment by the person or authority to blame, and any sum ordered to be paid by a local authority might, in accordance with regulations made by the Secretary for Scotland, be paid out of the Local Taxation (Scotland) Account, and deducted from any sum payable to that local authority (ss. 63 (6) and 80 (3)). The person holding an inquiry was to have the powers conferred by ss. 7, 8 of the Public Health (Scotland) Act, 1897 (ss. 63 (5) and 80 (3)). The Board might, for the purposes of their powers and duties under the Act, hold local inquiries, and had the same powers of inquiry as under the Public Health Act. Any "approval" given by the Board under the Act might be given subject to conditions (s. 77).

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[1] *Edinburgh Town Council* v. *Distress Committee of Edinburgh*, 1910 S.C. 153.

[2] 7 Edw. VII. c. 40.

[3] 8 Edw. VII. c. 67.

[4] 8 Edw. VII. c. 40.

[5] 1 & 2 Geo. V. c. 55.

1125. Under the Rag Flock Act, 1911,[1] it was not lawful to sell or possess for sale, or to use for making bedding or for upholstery "flock manufactured from rags," unless the flock conformed to such standard of cleanliness as might be prescribed by regulations to be made by the Local Government Board. Such regulations were to be laid before Parliament.

1126. The powers and duties of the Department of Health for Scotland are thus very wide and far-reaching. Since the passing of the Local Government (Scotland) Act, 1929, the Department is charged with the supervision of many duties now carried out by the county councils in the counties and by the town councils in the large burghs.

SUBSECTION (3).—*The Department of Agriculture for Scotland.*

1127. The duties of the Department of Agriculture for Scotland were formerly discharged by the Board of Agriculture for Scotland. The Board was constituted in virtue of the Small Landholders (Scotland) Act, 1911,[2] s. 4. It consisted of not more than three persons appointed by the King on the recommendation of the Secretary for Scotland. The Board was charged with the general duty of promoting the interests of agriculture, forestry, and other rural industries in Scotland, and an annual report of the proceedings of the Board was submitted to the Secretary for Scotland to be laid before the Houses of Parliament by him. The Board was empowered to collect statistics relating to agriculture, and to aid and develop instruction in agriculture and schemes for agricultural co-operation. The members of the Board were appointed during His Majesty's pleasure, and a secretary to the Board was appointed from time to time by the Secretary for Scotland. The powers and duties of the Board of Agriculture and Fisheries constituted by 52 & 53 Vict.

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[1] 1 & 2 Geo. V. c. 52.

[2] 1 & 2 Geo. V. c. 49.

c. 30 and 3 Edward VII. c. 31, so far as exercisable in relation to Scotland, were transferred to the Board of Agriculture for Scotland. Sec. 5 of the Small Landholders (Scotland) Act, 1911, deals with the finance of the Board of Agriculture, and new small-holdings may be created by the Commissioner for Small-Holdings, one of the members of the Board appointed by the Secretary for Scotland, after negotiations with the landlords. All the powers and duties of the Board have now been transferred to the Department of Agriculture for Scotland.

SUBSECTION (4).—*The Prisons Department for Scotland.*

1128. Under statute[1] Her Majesty was empowered to appoint Prison Commissioners for Scotland for the purpose of inspecting, looking after, and reporting upon the Prisons in Scotland. The number was not to exceed three, of whom two were to be paid. The duties of the Commissioners were specified by the statute. The powers and duties of the Commissioners were transferred to the Prisons Department for Scotland by the Reorganisation of Offices Act, 1928.

SUBSECTION (5).—*The National Galleries of Scotland.*

1129. The National Galleries of Scotland consist of the several buildings situated in Edinburgh, and known as the Royal Institution, the National Gallery, and the Royal Portrait Gallery; and "shall include also any other buildings which may hereafter be prescribed by Order under the hand of the Secretary for Scotland."[2] The statute cited (the National Galleries of Scotland Act, 1906) established a Board for the purpose of managing the national galleries, and for such other purposes connected with the promotion of Fine Arts in Scotland as may be prescribed (s. 3.). This Board—to be called the Board of Trustees for the National Galleries of Scotland—is appointed by the Secretary for Scotland, and consists of seven members. Three of these must, at the time of their appointment, be members of elected local authorities in Scotland. The trustees hold office for five years, and they are eligible for reappointment. The Secretary of State for Scotland appoints one member chairman, and he has a deliberative as well as a casting vote. The Board must comply with the instructions of the Secretary of State for Scotland. An annuity of £2000 is payable to the Board by Parliament under the Treaty of Union and the Revenue of Scotland Act, 1718.[3] The Board of Trustees for Manufactures in Scotland was abolished by the 1906 Act,[4] and its powers, duties, and liabilities transferred to the new Board.

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[1] 40 & 41 Vict. c. 53.

[2] 6 Edw. VII. c. 50, s. 2.

[3] 5 Geo. I. c. 20.

[4] 6 Edw. VII. c. 50, s. 3.

OFFICIAL SECRETS ACT.

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PACTUM DE NON PETENDO.

See CAUTIONARY OBLIGATIONS; DISCHARGE.

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See ILLEGAL AND IMMORAL CONTRACTS.

PAINTINGS AND PICTURES.

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SECTION 1.—INTRODUCTION.

1130. The legal questions which may arise in regard to paintings and pictures fall under one or other of the following heads: (1) Questions affecting the property in the materials used in the composition of the picture; (2) questions relating to the heritable or moveable character of the finished work; and (3) questions of copyright.

SECTION 2.—PROPERTY IN MATERIALS.

1131. Where one paints a picture—it may be with colours which are not his own—upon a surface which belongs to another, questions of ownership arise which fall to be determined according to the rules of accession.[1] As regards the pigments, the answer is simple. A new article having been produced, the ownership of these is merged in that of the article, subject to compensation to their owner. The remaining question is more complicated. If the ground, board, or tablet of the picture belong to one and the picture be painted upon it by another, whether for his own use or for that of a third party, it is clear that "there doth not continue two distinct properties—one of the board and the other of the picture—nor an interest in communion by proportion of the interests, but the property of the whole falleth to one." [2] To which it falls is determined by the following rules: (1) If the picture be painted upon a wall or other immoveable, its ownership becomes identified with that of its groundwork. (2) Whenever, too, the picture is designed for the ornamentation of the groundwork (as *e.g.* a cabinet or the like), the painting goes to the proprietor of the article upon which it is painted. But (3) if a picture is drawn upon a board or canvas which is merely used to provide a surface for its execution, convenience dictates that the board or other surface should be deemed the accessory and the painting the principal subject—the painter, accordingly, being entitled to the ownership of the whole. In all cases the owner of the whole is liable to pay to the other the amount *in quantum lucratus est*, and that even although the painting be done by one who knew that the ground was not his own—the mere fact not being enough to raise the presumption of an intention of donation.[1]

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[1] See PROPERTY, *post*.

[2] Stair, ii. 1, 39.

SECTION 3.—HERITABLE OR MOVEABLE NATURE OF PAINTINGS.

1132. This question involves considerations not exactly identical with those arising under the last head. In cases, no doubt, where the ownership of the material becomes accessory to the painting, it may be taken as a general rule that the subject is moveable; but it does not follow, conversely, that where the ownership of the groundwork draws with it that of the painting, the whole is necessarily heritable. The case of the cabinet is an instance to the contrary. The leading Scottish case on the subject is that of *Cochrane*,[2] in which was considered the English judgment in *Beck* v. *Robow*.[3] *Cochrane's* case related to the ownership of two pictures—portraits of no great value—and a third picture, a portrait of King Charles II., alleged to be by Sir Peter Lely, which was, if genuine, of some value. The two former pictures were in ordinary gilt frames, not hung, but screwed into the wall, with a dust moulding concealing the screw plates. The King Charles picture was inserted in a mirror frame designed in harmony with the general scheme of decoration of the wall in which it stood. The panelling under the two less valuable pictures was left in a rough state, and there was none under the other, its backing being the stone wall of the apartment. All the pictures were on ordinary stretcher frames. The whole three pictures were held, in a question with the purchaser of the house in which they stood, to be moveable and not earned by the sale of the house.

1133. The *criteria* to which importance seems to have been attached in *Cochrane's* case were the following: (1) The subjects in dispute were evidently primarily works of art, and not mere decorative panels; (2) the pictures and the frames together formed an independent chattel, capable of removal without injury to the apartment; (3) even were this doubtful in the case of the King Charles picture, it and its stretcher frame were removable by slipping them out of the gilt frame; (4) in point of fact, all the pictures had been removed for the purpose of cleaning; (5) the degree of attachment to the walls was not greater than was fairly required for the security of the pictures; (6) *in dubio* the question of the King Charles picture was to be looked at in the light of the general character of the whole subjects. In *Beck's* case[3] a similar test, viz. whether the articles were not mere matter of furniture and ornamentation, was regarded as conclusive. Where, however, the painting is of the nature of a panel or fresco, its ownership would pass as accessory to the ownership of the wall which it is designed to adorn.

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[1] Stair, ii. 1, 39; Bankt., i. 509. [2] *Cochrane* v. *Stevenson*, 1891, 18 R. 1208.
[3] 1706, 1 P. Wms. 92.

1134. While in *Cochrane's* case the question was between seller and purchaser, it was indicated that the *criteria* there applied would also have been substantially applicable as between heir and executor.[1] But it was pointed out that in many cases of sale the question might fall to be determined upon a construction of the strict terms of the whole contract in the light of such circumstances as the price paid and the value of the pictures.[2]

1135. Paintings and pictures fall within the category of HEIRSHIP MOVEABLES.[3] Professor More states that pictures often included in an entail would probably not be effectually excluded thereby from the diligence of creditors of the heir in possession.[4] This must be restricted to such pictures as do not form part of the heritable subject under the foregoing rules. In regard to the subjects to which the *dictum* is applicable, however, there seems equal reason to hold that the entail would be ineffectual to preclude voluntary alienation by the heir in possession.

SECTION 4.—COPYRIGHT.

See COPYRIGHT, Vol. IV., p. 504, *ante*.

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[1] *Per* Lord Kyllachy, Ordinary, 1891, 18 R., at p. 1212.

[2] *Ibid.*, *per* Lord Kyllachy and Lord M'Laren; cf. *Cave* v. *Cave*, 1705, 2 Vern. 508; *Fisher* v. *Dixon*, 1845, 4 Bell's App. 286; *D'Eyncourt* v. *Gregory*, 1866, L.R., 3 Eq. 382; *Birch* v. *Dawson*, 1834, 2 A. & E. 37; *Dowall* v. *Miln*, 1874, 1 R. 1180; *Harvey* v. *Harvey*, Buller's Nisi Prius Rep., 7th ed., 34; Amos and Ferrard on Fixtures.

[3] See Vol. VII., p. 549, *ante*.

[4] More, Notes to Stair, clxxx.

PANNEL.

See CRIME (PROCEDURE).

PARAPHERNALIA.

See HUSBAND AND WIFE.

PARDON.

See CRIME (ADMINISTRATION).

PARENT AND CHILD.

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PARISH.

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SECTION 1.—INTRODUCTORY.

1136. The division of Scotland into parishes was ecclesiastical in origin but became of importance in matters of civil administration. The division is exhaustive: "it would be inconsistent with the law of Scotland to hold that any lands are extra-parochial." [1] This fact, and the circumstance that such matters of local administration as poor relief and education, which are now civil obligations, were formerly regarded as pious duties, and were managed under ecclesiastical supervision, go far to explain how the parish, at first an ecclesiastical division, came also to be an area for the purposes of local government.

SECTION 2.—PARISH AS ECCLESIASTICAL AREA.

1137. The former law and practice relating to the alteration of parish boundaries, the union and division of parishes, and the disjunction and erection of parishes *quoad omnia* and *quoad sacra*, are treated under CHURCH.[2] Since the union in 1929 of the Church of Scotland and the United Free Church of Scotland these matters, for the purely ecclesiastical purposes of the united Church of Scotland, are regulated by the General Assembly of the Church.

SECTION 3.—PARISH AS CIVIL ADMINISTRATIVE AREA.

1138. The administration of the poor law was the most important matter in regard to which the parish became a civil administrative area. The civil parish was at first simply the parish *quoad omnia*. The Poor Law (Scotland) Act, 1845,[3] contained no definition of "parish." None was necessary. The parishes were adopted as they stood, all erections or annexations *quoad sacra tantum* being disregarded. However, the provisions of the Local Government (Scotland) Acts of 1889 [4] and 1894 [5] resulted in important changes in parochial areas for purposes of local government, the Secretary for Scotland having power under these Acts to detach a portion of an existing parish and form it into a new parish.[1]

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[1] *Ross* v. *Earl of Haddington*, 1824, 3 S. 115; cf. *Stevenson* v. *Macnair*, 1879, 7 R. 270, at p. 275.

[2] Vol. III. p. 314, *ante*.

[3] 8 & 9 Vict. c. 83.

[4] 52 & 53 Vict. c. 50.

[5] 57 & 58 Vict. c. 58.

1139. The civil parish, the universal area as regards the poor law, was adopted for a number of other purposes of local administration, but the actual area varied for these different purposes. Thus, under the Registration of Births, Deaths, and Marriages (Scotland) Act, 1854,[2] parishes did not include royal or parliamentary burghs. This Act adopted parishes, so defined, as registration districts, but empowered sheriffs to alter the districts and to create new registration districts. The Vaccination (Scotland) Act, 1863,[3] adopted these registration districts as administrative units, but as the expenses incurred in the execution of the Act were defrayed out of the poor rate the parish became the universal area for this purpose. Parishes, exclusive of the area of any burgh or part of a burgh situated therein, were also adopted as administrative areas for the purposes of the Public Libraries Consolidation (Scotland) Act, 1887.[4] The Public Libraries (Scotland) Act, 1899,[5] authorised neighbouring areas, whether two parishes or a parish and a burgh, which had adopted the former Act to combine in carrying it into execution. Again, under the Burial Grounds (Scotland) Act, 1855,[6] parishes became administrative areas except in parliamentary burghs. In the Roads and Bridges (Scotland) Act, 1878,[7] parishes were defined as being exclusive of any burgh or police burgh wholly or partly situated therein. The Education (Scotland) Act, 1872,[8] adopted landward parishes, exclusive of any portions of royal or parliamentary burghs and of certain specified towns, as school-board areas. The Education (Scotland) Act, 1918,[9] did not retain parishes as administrative areas for education, but provided for the collection by parish councils of the education rate, apportioned amongst the parishes within an Education Authority's area according to their respective valuations in the valuation roll. This arrangement was abolished by the Rating (Scotland) Act, 1926,[10] which placed the collection of all local rates in the hands of town and county councils.

SECTION 4.—EFFECT OF LOCAL GOVERNMENT (SCOTLAND) ACT, 1929.

1140. Since the coming into operation of the Local Government (Scotland) Act, 1929,[11] the parish has ceased to be the unit of administration of the poor law and other matters formerly in the charge of parish councils. By that Act the functions of parish councils have been transferred to county councils and town councils of large burghs (burghs with a population of 20,000 upwards) according respectively as the functions related to the county or the burgh.[1] As regards landward parishes, certain of the parish council's former functions have been transferred to newly created district councils.[2] The same Act has provided that the settlement of a person instead of being ascertained by reference to a parish, as under the former law, shall be ascertained by reference to a county or large burgh.[3] While parishes may be retained as subdivisions of their areas for certain purposes by town and county councils, it is clear that the transfer of functions above referred to will result in the virtual disappearance of parishes as independent civil administrative areas.

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[1] *Dundee Combination Parish Council* v. *Secretary for Scotland*, 1901, 3 F. 848.

[2] 17 & 18 Vict. c. 80.

[3] 26 & 27 Vict. c. 108.

[4] 50 & 51 Vict. c. 42.

[5] 62 Vict. c. 5.

[6] 18 & 19 Vict. c. 68.

[7] 41 & 42 Vict. c. 51.

[8] 35 & 36 Vict. c. 62.

[9] 8 & 9 Geo. V. c. 48.

[10] 16 & 17 Geo. V. c. 47.

[11] 19 & 20 Geo. V. c. 25.

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[1] 19 & 20 Geo. V. c. 25, s. 1.

[2] *Ibid.*, ss. 1, 25, 26.

[3] *Ibid.*, s. 32.

PARISH COUNCIL.

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Note.—In these sections the following abbreviations are used :—

"Act of 1889," *i.e.* the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50) ;
"Act of 1894," *i.e.* the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58) ;
"Act of 1908," *i.e.* the Local Government (Scotland) Act, 1908 (8 Edw. VII. c. 62) ;
"Act of 1929," *i.e.* the Local Government (Scotland) Act, 1929 (19 & 20 Geo. V. c. 25).

General Authorities.—Graham, Manual of the Acts relating to Parish Councils in Scotland, 1897, and The Law relating to the Poor and to Parish Councils, 1922 ; Shennan, The Parish Councillor's Hand-Book, 5th ed., 1908 ; Ellis, Local Government Act, 1894, 1912 ; Whyte, Local Government (Scotland) Act, 1929.

Section 1.—Constitution and Abolition.

1141. Parish Councils were created by the Local Government (Scotland) Act, 1894 [1] (s. 8). They took the place of the Parochial Boards as from 15th May 1895 and were given all the powers and duties of the Parochial Boards (ss. 21 and 22). By the Local Government (Scotland) Act, 1929,[2] Parish Councils were in turn abolished as from 16th May 1930. The whole of their functions (except those transferred to District Councils [3] and the functions relating to burial grounds, etc., transferred to the Town Council of a small burgh [4]) were transferred to and vested in (*a*) the County Council of the county as reconstituted so far as the functions related to the county (including the small burghs therein), and (*b*) the Town Council of the large burgh [5] so far as the functions related to the large burgh.

1142. The functions transferred to the District Councils were those formerly exercised by rural Parish Councils and Landward Committees and are specified in s. 1 (2) of the Act of 1929.[6] The functions of a Parish Council exercisable in a small burgh under the Burial Grounds Acts [7] and the Cremation Act, 1902,[8] and the functions of a Parish Council with respect to a churchyard, so far as within a small burgh, were transferred to the Town Council of the small burgh.[9]

Section 2.—Parochial Boards.

1143. The subject of Parochial Boards is now chiefly of historical interest. Prior to 1845 poor relief was administered in burghal parishes by the magistrates, in landward parishes by the heritors and kirk session jointly, and in mixed parishes by magistrates, heritors, and kirk session jointly. By the Poor Law (Scotland) Act, 1845,[10] a Parochial Board of managers of the poor was established in every parish, and the whole administration of the laws for the relief of the poor was placed under the direction and control of such boards. They continued to be the authority for poor law administration for fifty years until their abolition in 1895. A leading feature of their history was the manner in which additional duties of administration were imposed on them, *e.g.* vaccination, burial grounds, registration, public health, etc.

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[1] 57 & 58 Vict. c. 58.

[2] 19 & 20 Geo. V. c. 25, s. 1 (1).

[3] For constitution of District Councils see ss. 25 and 26.

[4] *I.e.* any burgh other than a "large burgh," s. 77 (1).

[5] *I.e.* a burgh with a population of 20,000 or upwards, including the burgh of Arbroath, s. 77 (1).

[6] See paras. 1151 and 1173 *et seq.*, *infra*.

[7] "Burial Grounds Acts" means the Burial Grounds (Scotland) Act, 1855 (18 & 19 Vict. c. 68), and the Acts amending that Act, including the Act of 1929 (s. 77 (1) *ibid.*).

[8] 2 Edw. VII. c. 8.

[9] Proviso to s. 1 (1), Act of 1929. See paras. 1161–1166 and 1191, *infra*.

[10] 8 & 9 Vict. c. 83, ss. 17, 22.

SECTION 3.—PARISH COUNCIL ELECTIONS.

SUBSECTION (1).—*Provisions as to Elections.*

1144. Although Parish Councils have been superseded, the manner of the election of their members is still material, as by s. 25 (4) of the Act of 1929 it is provided that for the purposes of the second [1] and subsequent elections of members of the District Councils set up by that Act,[2] the statutory provisions [3] regulating the election of parish councillors in landward parishes and the landward parts of parishes (including the provisions of s. 18 of the Act of 1894) shall apply, subject to such modifications and adaptations as the Secretary of State may by order prescribe.

1145. The Parish Council was elected triennially. In the case of a landward parish the election took place on the same day and as nearly as might be in the same manner as the election of councillors for the county in which the parish was situated.[4] The enactments regulating the election of county councillors applied, with the necessary variations, to the election of parish councillors.[5] The returning officer was the County Council returning officer. The parish councillors remained in office for three years, and all went out of office together. It was the duty of the County Council of every county to make due provision for the election of parish councillors in landward parishes.[6] The expenses of elections of District Councils must be repaid by them to the County Councils.[7]

SUBSECTION (2).—*Notice of Election, Nomination Papers, etc.*

1146. By s. 16 of the Act of 1894 (as amended by s. 9 (1) of the Act of 1908) the returning officer required to give notice of the election not later than four o'clock afternoon on the fourth Tuesday preceding the day of election, and nomination papers had to be lodged with him before four o'clock on the third Tuesday preceding the day of election. Provision was also made for publication of the names of the candidates, and the conditions under which they might withdraw their nominations were specified.

SUBSECTION (3).—*Powers and Duties of Returning Officers.*

1147. By s. 17 the returning officer was directed to make arrangements for the purpose of enabling nomination papers and notices of withdrawal to be obtained, and, when filled up, to be received and dealt with at some place within or adjoining the parish. He also required to give intimation to the clerk of the Parish Council of the persons elected as parish councillors.[1] Forms of nomination and notice of withdrawal are given in the Second and Third Schedules to the Act of 1894.[2]

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[1] The first election of members of District Councils took place on 8th April 1930; the second election will take place on the first Tuesday of December 1932.

[2] See ss. 25, 26.

[3] Secs. 14, 16, 17, and 18 of the Act of 1894, and s. 9 (1) of the Act of 1908.

[4] Act of 1889, ss. 30–36; Act of 1894, s. 16; Act of 1908, s. 9 (1).

[5] Act of 1894, s. 14.

[6] Act of 1894, s. 14 (6).

[7] Act of 1929, s. 25 (4).

SUBSECTION (4).—*Failure to hold Election or to elect Sufficient Numbers, etc.*

1148. If an election were not held at the proper time, or if an insufficient number of councillors were elected, or if the council became unable to act by reason of deficiency in the number of councillors, the Central Authority (*i.e.* now the Department of Health for Scotland)[3] might order a new election.[4]

SECTION 4.—MEETINGS, CONDUCT OF BUSINESS, ETC.

1149. The statutory provisions which governed the meetings and conduct of business of Parish Councils are still of importance as, by s. 26 (3) of the Act of 1929, they are made applicable to District Councils. That subsection provides that the provisions of the Act of 1894 applicable to Parish Councils with respect to meetings,[5] conduct of business,[5] quorum,[6] filling of casual vacancies,[7] the chairman of the council and of meetings,[8] disqualification of councillors,[9] appointment of committees,[10] payments and receipts,[11] budget,[12] and absence of councillors from meetings[13] shall, with the necessary modifications, apply to District Councils and the members thereof. The subsection also provides that the provisions of s. 31 (which relate to the use of schoolrooms by parish electors, and the Parish Council), and s. 38 (2) of the Act of 1894 (which relate to returns to the Secretary of State as to outstanding loans) shall, with the necessary modifications, apply to District Councils and the electors thereof.

SECTION 5.—PARISH COUNCIL FUNCTIONS TRANSFERRED.

SUBSECTION (1).—*To County Councils and Town Councils of Large Burghs.*

1150. By s. 1 (1) of the Act of 1929 all the functions[14] of each Parish Council (except the functions transferred by that section to a District Council[15] or to the Town Council of a small burgh[16]) were transferred to and vested in—

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[1] Act of 1894, s. 17.

[2] Modified by County, Town, and Parish Councils (Disqualification) Act, 1914 (4 & 5 Geo. V. c. 39), s. 2.

[3] See the Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34), and the Scottish Board of Health Act, 1919 (9 & 10 Geo. V. c. 20).

[4] Act of 1894, s. 18.

[5] Sec. 19 (2).

[6] Sec. 19 (3).

[7] Sec. 19 (4).

[8] Sec. 19 (5) and (6).

[9] Sec. 20.

[10] Sec. 33.

[11] Sec. 35.

[12] Sec. 37.

[13] Sec. 41.

[14] "Functions" includes powers and duties, s. 77 (1).

[15] For constitution, see ss. 25 and 26.

[16] See paras. 1152, 1191, *infra*.

(*a*) the County Council of the county as reconstituted in accordance with the provisions of s. 8, so far as the functions related to the county (including the small burghs [1] therein) or a portion thereof; and

(*b*) the Town Council of the large burgh [2] so far as the functions relate to the large burgh or a portion thereof.

Subsection (2).—*To District Councils.*[3]

1151. By s. 1 (2) of the Act of 1929, the following functions of the Parish Council of each landward parish, and of each parish containing a landward part, so far as relating to the landward part, were transferred to and vested in the District Council for the district, vizt.:—

(*a*) Under Part IV. of the Act of 1894, *i.e.* ss. 23 to 29, which conferred new powers on Parish Councils in landward parishes and Landward Committees; [4]

(*b*) under Part V. (other than subs. (6) of s. 30) of the Act of 1894 (except in the case of parish trusts, so far as relating to the poor, or to churchyards or to burial grounds). Part V., *i.e.* s. 30, conferred powers on Parish Councils in regard to the administration of parish trusts and parish charities; [5]

(*c*) under the Allotments Acts; [6]

(*d*) under s. 79 of the Licensing (Scotland) Act, 1903,[7] which provides for notice being given to a Parish Council of an application for registration of a club when the club was situated outwith a burgh, and for lodging objections against such application;

(*e*) under s. 49 of the Post Office Act, 1908,[8] which empowered a Parish Council to contribute towards the cost of providing a post office, telegraph office, etc., in any place within their district.

Subsection (3).—*To Town Councils of Small Burghs.*

1152. Any functions of a Parish Council exercisable in respect of a small burgh [9] under the Burial Grounds Acts [10] and the Cremation Act, 1902,[11] and any functions of a Parish Council with respect to a churchyard, so far as within a small burgh, vested in the council in pursuance of s. 30 (6) of the Act of 1894, or s. 32 of the Church of Scotland (Property and Endowments) Act, 1925,[1] were transferred to and vested in the Town Council of the burgh.

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[1] "Small Burgh" means any burgh other than a large burgh, s. 77 (1).

[2] "Large Burgh" means any burgh containing a population of 20,000 or upwards and includes the Burgh of Arbroath, s. 77 (1).

[3] For constitution, see ss. 25 and 26.

[4] See para. 1173 *et seq.*, *infra*.

[5] See paras. 1185, 1186, *infra*.

[6] "Allotments Acts" means the Allotments (Scotland) Acts, 1892 to 1926; see s. 77 (1), Act of 1929. See para. 1187, *infra*.

[7] 3 Edw. VII. c. 25. See para. 1188, *infra*.

[8] 8 Edw. VII. c. 48. See para. 1189, *infra*.

[9] "Small burgh" means any burgh other than a large burgh, Act of 1929, s. 77 (1).

[10] See para. 1142, note 7, *supra*.

[11] 2 Edw. VII. c. 8.

SECTION 6.—FUNCTIONS NOW VESTED IN COUNTY COUNCILS AND TOWN COUNCILS OF LARGE BURGHS.

SUBSECTION (1).—*Poor Law Administration.*

(i) *Schemes of Administration.*

1153. The administration of the Poor Law was the most important of the functions entrusted to the Parish Councils. The principal statute is the Poor Law (Scotland) Act, 1845,[2] which has been amended by many statutes. For a list of these see POOR LAW. By s. 14 of the Act of 1929 the County Council of every county [3] and the Town Council of every large burgh [4] were required, on or before 31st March 1930, to submit to the Secretary of State for his approval a scheme or schemes of administrative arrangements (referred to in the Act as administrative schemes) proposed to be made for discharging throughout their area the functions of the council relating to, *inter alia*, poor law.

(ii) *Statutory Committee.*

1154. Every reconstituted County Council must appoint a committee for the purposes of their poor law functions,[5] and all matters relating to such functions must stand referred to the committee.[6] Before exercising their functions the council must, unless in their opinion the matter is urgent, receive and consider a report from the committee with reference to the matter in question.[7] Subject to any regulations or directions by the County or Town Council, the committee may appoint subcommittees and may delegate any of their functions to them.[8] The County Council's power to delegate their functions (other than education or police) to the Town Councils of small burghs, District Councils, etc., is regulated by s. 13 of the Act of 1929.

SUBSECTION (2).—*Lunacy and Mental Deficiency.*

1155. Parish Councils had certain duties under the Lunacy and Mental Deficiency Acts, 1857 to 1919,[9] in connection with pauper lunatics and mental defectives. These included the duty of placing such lunatics in asylums[1] or, if suitable, in lunatic wards of poorhouses,[2] or under guardianship in private dwellings.[3] They were also obliged to ascertain the mental defectives[4] within their area who required to be provided for by public assistance, and to arrange for their being sent to institutions or placed under guardianship,[5] except those who fell to be dealt with by Education Authorities.[6] The expenses incurred by the new authorities (County Councils and Town Councils of large burghs) in administering the Lunacy and Mental Deficiency Acts are to be defrayed out of a rate to be levied for the purpose in accordance with the provisions of the Act of 1929, *i.e.* as part of the consolidated rate leviable under s. 19.[7] By s. 14 the new authorities were obliged to submit to the Secretary of State for his approval a scheme of the administrative arrangements proposed to be made by them for discharging throughout their areas their functions relating to, *inter alia*, lunacy and mental deficiency.[8]

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[1] 15 & 16 Geo. V. c. 33.

[2] 8 & 9 Vict. c. 83.

[3] *I.e.* as reconstituted under s. 8, *ibid.*

[4] *I.e.* a burgh containing a population of 20,000 or upwards, including the Burgh of Arbroath.

[5] Act of 1929, s. 12 (2).

[6] Other than functions relating to the raising of money by rate or loan, and except where for the purpose of co-ordinating the services provided by the council it is otherwise specified in the appropriate scheme. Act of 1929, s. 12 (3) (*a*).

[7] Sec. 12 (3) (*a*).

[8] Sec. 12 (7).

[9] See INSANITY AND LUNACY, Vol. VIII. para. 494, *ante*, for a list of these Acts.

SUBSECTION (3).—*Protection of Infants and Children.*

(i) *Where Infants received for Reward.*

1156. Under Part I. of the Children Act, 1908,[9] Parish Councils had certain powers and duties with reference to the welfare of children. Anyone undertaking for reward the nursing and maintenance of infants under seven years of age was bound to give written notice to the Local Authority,[10] with specified details, within forty-eight hours of the reception of any such infant (s. 1). Such notice will now be given to the County Council or, in the case of a large burgh, the Town Council. Similar notice must be given of change of residence of such person, and of the death or removal of the infant. It is the duty of the Local Authority to make inquiry as to whether there are persons residing within their district who undertake such maintenance, and to appoint Infant Protection Visitors to see that such infants are properly attended to (s. 2 (1) (2)). Penalties are imposed on refusal to allow such visitors to visit the infants or the premises in which they are kept (s. 2 (5) and (6)). The local authority may fix the number of infants which may be kept in any house in respect of which notice has been given under the Act (s. 4), and they may order the removal to a place of safety[11] of any infant to which the Act applies, where it is being kept in dangerous or insanitary premises, or by any person who is unfitted to have the care of it (s. 5). Certain persons are prohibited from receiving children for reward (s. 3). A Parish Council had no title to prosecute, even with concurrence of the procurator-fiscal, for offences against Part I. of the Act.[1]

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[1] Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), s. 59; Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71), s. 95.

[2] Lunacy (Scotland) Act, 1862 (25 & 26 Vict. c. 54), ss. 3, 4.

[3] *Ibid.*, s. 5.

[4] For definition see Mental Deficiency and Lunacy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 38), s. 1.

[5] *Ibid.*, s. 2 (5).

[6] *Ibid.*, ss. 2, 3 (1) (*b*), 3 (2). See *Glasgow School Board* v. *Glasgow Parish Council*, 1915 S.C. 1916; 26 P.L.M 1915, 225 (Parish Council and not School Board held liable for maintenance of defective pauper children).

[7] Act of 1929, s. 18 (3).

[8] See para. 1153, *supra*. See INSANITY and LUNACY, Vol. VIII. p. 201, particularly paras. 501, 502, and 526.

[9] 8 Edw. VII. c. 67.

[10] *I.e.* the Parish Council (*ibid.*, ss. 10 and 132 (7)).

[11] Includes poorhouse (*ibid.*, ss. 131, 132 (6)).

(ii) *Cruelty to Children.*

1157. Parish Councils were authorised to take proceedings under Part II. of the Children Act for offences against children or young persons (ss. 34 and 132 (7)), and this duty will now devolve on County Councils or Town Councils of large burghs. In practice the duty is left to the public prosecutor. Cases for prosecution are generally brought under his notice by societies for the prevention of cruelty to children, and it was specially provided that Parish Councils might, with the approval of the Central Authority,[2] subscribe to the funds of such societies (s. 132 (20)).

(iii) *Children in Poorhouses, or Boarded Out.*

1158. Parish Councils had to provide for children and young persons brought to poorhouses in pursuance of the Act, which are for that purpose "places of safety" under the Act. The expenses of maintenance form part of the establishment charges of the poorhouse (ss. 126, 131, 132 (8)). Where the council satisfied the Court that any child maintained in a poorhouse was refractory, or was the child of parents either of whom had been convicted of any offence punishable by penal servitude or imprisonment, and that it was desirable that the child be sent to an industrial school, the Court might order him to be sent there (s. 58 (5)).[3] In such case the Parish Council and not the Education Authority had to pay for the maintenance of the child (s. 74 (5) (*b*), (11), 132 (7)). Where the parent of a child applies to the Court for production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, it may refuse to enforce his right to the custody of the child, but if it does order the child to be given up, it may order the parent to pay the Parish Council (now the County Council, or Town Council of a large burgh) the costs incurred in bringing up the child.[4]

SUBSECTION (4).—*Vaccination.*

1159. The Acts regulating the compulsory vaccination of children are the Vaccination (Scotland) Act, 1863,[5] and the Vaccination (Scotland) Act, 1907.[6] These Acts were administered by the Parish Councils in conformity with regulations made by the Central Authority, now the

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[1] *Glasgow Parish Council* v. *Edward*, 1914 S.C. (J.) 159; see also *Leith* v. *M'Kay*, P.L.M. 1913, 240.

[2] Now the Department of Health for Scotland.

[3] But see Mental Deficiency and Lunacy Act, 1913 (3 & 4 Geo. V. c. 38), s. 9.

[4] Custody of Children Act, 1891 (54 & 55 Vict. c. 3).

[5] 26 & 27 Vict. c. 108.

[6] 7 Edw. VII. c. 49.

Department of Health for Scotland,[1] and they are now administered by the County Councils or Town Councils of the large burghs. The Act of 1907 (s. 1 (1)) exempts from the statutory penalties[2] any parent or guardian who, within six months from the birth of the child, makes a statutory declaration that he conscientiously believes that vaccination would be prejudicial to the health of the child, and within seven days thereafter delivers the declaration to the Registrar of the district in which the child was born and registered.

1160. The Local Authority for administering the vaccination provisions of the Public Health (Scotland) Act, 1897,[3] is now the County Council or the Town Council of a large burgh, and they may defray the cost of vaccinating or re-vaccinating such persons as to them may seem expedient (s. 77). The Local Authority have no powers to compel such persons to be vaccinated if they do not consent. The expenses of administering the Vaccination Acts fell formerly upon the poor rate levied by Parish Councils. All rates leviable by a rating authority throughout the whole area of that authority (in this case the county or large burgh) are leviable as one rate known as the consolidated rate.[4]

SUBSECTION (5).—*Burial Grounds, Churchyards, and Crematoria.*

(i) *Burial Grounds Acts*, 1855 *to* 1886.

1161. Parish Councils were the Local Authorities for administering the Burial Grounds Acts, 1855,[5] 1857,[6] and 1886,[7] and the Cremation Act, 1902,[8] except in parishes comprised within the limits of parliamentary burghs (*i.e.* those "sending or contributing to send a member to Parliament"), as these limits were defined by the Valuation of Lands Act, 1854.[9] In these burghs the Town Councils were the authority.[10] Accordingly, in police burghs and in royal burghs which were not parliamentary, the Parish Councils were the Burial Authorities. As a result of s. 1 (1) of the Act of 1929, including the proviso, the burial-ground functions of a Parish Council are transferred (1) to the County Council in so far as the functions relate either to the landward part of the county or to a portion thereof, and (2) to the Town Council of any burgh, whether large or small, so far as the functions relate either to the burgh or to a portion of the burgh. Sec. 2 (1) (*e*) also provides that the burial-ground functions of a Town Council, whether of a large or a small burgh, exercisable in respect of any area outwith the burgh and within the county, are transferred to the County Council. Sec. 6 deals with the transfer of property and liabilities of transferor authorities. The effect of that section is that where the burial-ground functions of a wholly landward parish are transferred to the County Council the whole property and liabilities held or incurred for the purposes of such functions will also be transferred to and vest in the County Council. In the case of a burghal-landward parish the whole property and liabilities relating to the burial ground will be transferred in accordance with the provisions of s. 6 (1) (*b*). In terms of that section it will be a matter for agreement whether the property and liabilities are to be transferred to the Town Council or to the County Council or to the two councils jointly. Failing agreement, the matter will be for the Department of Health for Scotland to determine. The property is transferred irrespective of its situation.

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[1] 1863 Act, s. 5. For successive changes in local and central authorities see Act of 1894, ss. 3, 21; the Scottish Board of Health Act, 1919 (9 & 10 Geo. V. c. 20), and the Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34).

[2] 1863 Act, ss. 17 and 18.

[3] 60 & 61 Vict. c. 38.

[4] Act of 1929, s. 19 (1).

[5] 18 & 19 Vict. c. 68. See s. 2, and Act of 1894, s. 21.

[6] 20 & 21 Vict. c. 42.

[7] 49 Vict. c. 21.

[8] 2 Edw. VII. c. 8. See s. 3.

[9] 17 & 18 Vict. c. 91.

[10] 18 & 19 Vict. c. 68, s. 2, as amended by the Nuisances Removal (Scotland) Act, 1856 (19 & 20 Vict. c. 103).

(ii) *Closure of Old Burial Grounds.*

1162. The powers vested in Parish Councils included powers to initiate procedure for the closure of old burial grounds and to provide new ones. Where a burial ground had been closed by Order of the Privy Council as dangerous to health or offensive to decency,[1] following upon a petition to the Sheriff by any two parish councillors,[2] the Parish Council were bound to proceed forthwith to provide a burial ground to take its place. If they failed to do so within six months after such order, or if they failed to obtain suitable ground by agreement, application might be made to the Sheriff, who was empowered to designate and set apart ground for the purpose [3] which could be acquired compulsorily.[4] See BURIAL AND CREMATION.[5]

(iii) *Provision of New Burial Grounds.*

1163. By s. 9 of the 1855 Act, Parish Councils were empowered to provide a new burial ground although no old one had been compulsorily closed. The new burial ground was provided in the same manner as if an old burial ground had been closed by Order in Council under s. 10. No new burial ground, or any addition to an existing one, can be made within 100 yards of any dwelling-house without the consent of the owner and occupier thereof.[6]

(iv) *Rating and Borrowing.*

1164. By s. 26 of the 1855 Act, the expenses incurred by the Burial Authority in administering the Act, in so far as they are not met by fees or other payments, are raised by an assessment levied in the same way as the poor rate. It will now be included in the consolidated rate to be levied by the appropriate Local Authorities in terms of s. 19 of the Act of 1929. Parish Councils were authorised to borrow for the cost of providing burial grounds, provided that not less than one-twentieth of the principal was repaid each year (s. 27, 1855 Act), and s. 2 of the Burial Grounds Act, 1857, authorises the Public Works Loan Commissioners to make loans for the purposes of the 1855 Act. See BURIAL AND CREMATION.[1]

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[1] 18 & 19 Vict. c. 68, s. 5. By s. 16 (11) of Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), a churchyard, cemetery, or place of sepulture which is so crowded or otherwise offensive or injurious to health is declared to be a nuisance and may be dealt with under s. 22 of that Act.

[2] 18 & 19 Vict. c. 68, s. 4. See *Dunblane and Lecropt Parish Council*, 1924, 40 S.L. Rev. 3 (circumstances in which held that churchyard was offensive and contrary to decency, and ought to be closed subject to certain qualifications and reservations).

[3] 18 & 19 Vict. c. 68, s. 10. [4] *Ibid.*, s. 13. [5] Vol. II. para. 1285, *ante*.

[6] 18 & 19 Vict. c. 68, s. 11. In a petition for designation of a burial ground, the Sheriff is not entitled to award expenses against an objector (*Liddall* v. *Ballingry Parish Council*, 1908 S.C. 1082; P.L.M. 1908, 292).

(v) *Churchyards.*

1165. By s. 32 of the Church of Scotland (Property and Endowments) Act, 1925,[2] the property of any churchyard held by the heritors of any parish was transferred to the Parish Council to the same effect as if the churchyard had been transferred by the heritors to the council in pursuance of s. 30 (6) of the Act of 1894. As a result of the proviso to s. 1 (1) and of s. 1 (2) of the Act of 1929, the authority having control of a churchyard depends on the situation of the churchyard. Where it is situated within the burghal part of a burghal-landward parish, then, if it was vested prior to 16th May 1930 in the Parish Council, it passes to the Town Council, and if vested in the Town Council, it remains with them,—the County Council having no interest in it. Similarly where the churchyard is situated in the landward part of the parish, it is now transferred to the County Council whether vested in the Parish Council or in the Town Council, and the Town Council will have no further interest in it. Where, however, a churchyard is situated partly within and partly outside a burgh, it will become the joint property of the Town Council and the County Council who, in terms of s. 11 (6) of the Act of 1929, will be combined for the purpose of administering the churchyard on such terms as the councils may agree. If they fail to come to an agreement the Department of Health for Scotland will determine the matter.

1166. All expenses of and relating to churchyards vested prior to the commencement of the Act in Parish Councils are to be defrayed as expenses under the Burial Grounds Acts, and the provisions of s. 30 (6) of the Act of 1894, and of s. 32 of the Church of Scotland (Property and Endowments) Act, 1925, cease to have effect so far as inconsistent therewith.[3] See BURIAL AND CREMATION.[4]

SUBSECTION (6).—*Registration of Births, Deaths, and Marriages.*

1167. The registration of births, deaths, and marriages is regulated by the Registration of Births, Deaths, and Marriages (Scotland) Acts, 1854,[5] 1855,[6] and 1860.[7] While the Acts are administered by local registrars acting under the supervision of the Registrar-General, Parish

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[1] Vol. II. para. 1285, *ante.*

[2] 15 & 16 Geo. V. c. 33.

[3] Act of 1929, s. 18 (6).

[4] Vol. II. paras. 1287, 1288, *ante.*

[5] 17 & 18 Vict. c. 80.

[6] 18 & 19 Vict. c. 29.

[7] 23 & 24 Vict. c. 85.

Councils had the appointment [1] and remuneration [2] of the local registrars except within (*a*) royal and parliamentary burghs, where the Town Council exercised these functions,[3] and (*b*) special registration districts formed out of portions of two or more parishes, in which cases the heritors came in place of the Parish Council.[4] By s. 5, of the 1860 Act the Sheriff was empowered to unite landward and burghal parts of parishes, and to determine any questions as to the assessments to be levied and the election of a registrar for the united district.

1168. By s. 50 of the 1854 Act the Parish Council were empowered to levy an assessment for registration expenses in the same manner as, and along with but separate from, the poor rate. In burghal parishes the assessment was levied by the Town Council (s. 66); in special registration districts formed by the Sheriff out of portions of parishes, by the heritors (s. 4, 1855 Act); and in parishes partly landward and partly burghal, by the Parish Council or Town Council, as the Sheriff may have determined (s. 5, 1860 Act). Such assessments will now be included in the consolidated rate [5] to be levied by the Local Authorities to whom the administration of the Acts was transferred by the Act of 1929, vizt.: (*a*) the County Councils (including the small burghs therein) and (*b*) the Town Councils of large burghs.[6]

SUBSECTION (7).—*Public Libraries Acts,* 1887 *to* 1920.[7]

1169. Parish Councils were the Local Authority under the above Acts in landward areas of counties and were empowered to levy a library rate up to threepence in the pound.[8] By s. 14 (7) of the Act of 1929 it is provided that where the above Acts are in operation in the landward area of a county, the administrative scheme of the County Council relating to education may provide for the administration of the Acts being under the general supervision of the Education Committee, and for the appointment, as a library committee, of the District Council,[9] or of a committee composed as provided in the Act. Where the scheme makes such provision, the provisions of the Public Libraries Acts relating to the appointment of committees [10] do not apply. The Public

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[1] 1854 Act, s. 8. [2] *Ibid.*, ss. 50, 51; 1860 Act, ss. 17, 18. [3] 1854 Act, ss. 66, 76.

[4] By s. 10, *ibid.*, the Sheriff may unite two or more parishes or portions of parishes into one registration district, and by s. 4, 1855 Act, if a district consisting of portions of two or more parishes has been so formed, the powers conferred on Parish Councils were, prior to the coming into effect of the Act of 1929, exercised by the heritors.

[5] Act of 1929, s. 19.

[6] *Ibid.*, s. 1 (1), and s. 2 (1) (*b*) (functions of Town Councils of small burghs under Registration of Births, etc., Acts transferred to County Councils).

[7] *I.e.* Public Libraries Consolidation (Scotland) Act, 1887 (50 & 51 Vict. c. 42); Public Libraries (Scotland) Act, 1894 (57 & 58 Vict. c. 20); Public Libraries (Scotland) Act, 1899 (62 Vict. c. 5); and Public Libraries (Scotland) Act, 1920 (10 & 11 Geo. V. c. 45).

[8] 1887 Act, s. 8, as amended by 1920 Act, s. 1 (1). By s. 18 (5) of the Act of 1929 the proviso to s. 5 of the Education (Scotland) Act, 1918 (which relates to burghs or parishes in which a library rate is levied), has now ceased to have effect. [9] Act of 1929, s. 25.

[10] Public Libraries Act, 1887, s. 18; Public Libraries Act, 1899, s. 2. Every estimate of sums required by a committee under the Public Libraries Acts is subject to the approval of the Town Council or County Council as the case may be. Act of 1929, s. 41 (2).

Libraries Acts cannot be adopted in a landward parish or the landward part of a parish except with the sanction of the County Council.[1]

SUBSECTION (8).—*Rights of Way.*

1170. A Parish Council was authorised to make a representation to the District Committee or, where there was no District Committee, to the County Council with a view to the protection of any public right of way within the district or beneficial to the inhabitants.[2] The functions of Parish Councils and District Committees having been transferred to the County Council,[3] the duty of protecting and vindicating rights of way in landward areas now devolves solely on the County Council.[4]

SUBSECTION (9).—*Special Districts.*

1171. By s. 44 of the Act of 1894 a Parish Council of a landward parish was empowered to make a requisition in writing to the District Committee or to the County Council acting as such, calling on them to form special districts for lighting or scavenging, or the provision of public baths, washhouses, and drying grounds. Parish Councils were also empowered to make requisitions to the Local Authority for forming special drainage districts,[5] and special water supply districts.[6] By s. 33 (2) of the Act of 1929 it is provided that where statutory provision is made for a Local Authority to take steps to form a special district upon receiving a requisition, the authority may, on passing a resolution to that effect, proceed as if they had received a requisition for the purpose.

SUBSECTION (10).—*Alteration of Parish Areas.*

1172. By s. 46 of the Act of 1894 a Parish Council was authorised to make a representation to the Secretary for Scotland for alteration of the area of the parish, whether by changing the boundaries, uniting parishes, creating new parishes, dividing parishes, or other method.[7]

SECTION 7.—FUNCTIONS NOW VESTED IN DISTRICT COUNCILS.

SUBSECTION (1).—*Powers exercised by Rural Parish Councils and Landward Committees.*

1173. Part IV. of the Act of 1894 (ss. 23 to 29) conferred new powers on landward Parish Councils [9] and Landward Committees [8] to be exercised by them in rural districts. These powers, which will now devolve on District Councils,[1] included the following:—

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[1] Act of 1929, s. 41 (1). [2] Act of 1894, s. 42 (2). [3] Act of 1929, ss. 1 (1), 2 (1) (*a*).

[4] See paras. 1176 and 1184, *infra*, as to the acquisition of rights of way and maintenance of public ways.

[5] Public Health (Scotland) Act, 1897, s. 122.

[6] *Ibid.*, s. 131 ; see also Act of 1908, s. 14.

[7] See Local Government (Adjustments) (Scotland) Act, 1914 (4 & 5 Geo. V. c. 74), as to adjustment of financial relations on alteration of the boundaries of local government areas.

[8] "Parish Council" in Part IV. of the Act (and in this subsection) means the Parish Council in a parish containing no part of a royal, parliamentary, or police burgh and the Landward Committee in a parish containing any part of such a burgh.

(i) *Acquisition of Buildings.*

1174. Power was given[2] to provide or acquire buildings (including the necessary land) for public offices and for meetings, and for any purposes connected with parish business or with the powers or duties of the Parish Council.[3]

(ii) *Recreation Grounds.*

1175. Power was given to provide or acquire, maintain, lay out and improve grounds for public recreation.[4] This includes power to provide seats.[5]

(iii) *Rights of Way.*

1176. Power was given to acquire by agreement any right of way, whether within the parish or in an adjoining parish, the acquisition of which was beneficial to the inhabitants of the parish or of any part thereof.[6]

(iv) *Gifts.*

1177. Power was given to accept and hold any gifts of property for the benefit of the parish.[7] "Property" includes "all property heritable and moveable and all interests therein."[8] A Parish Council was held entitled to accept a gift of ground subject to limitations and lay it out and improve it with roads, trees, and streets.[9]

(v) *Execution of Works.*

1178. Power was given to execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of any of the foregoing powers, or in relation to any property of the Parish Council.[10]

(vi) *Joint Action.*

1179. Power was given to contribute towards the expense of doing any of the things above mentioned, or to agree or combine with any other Parish Council, or other authority or person, to do or contribute towards the expense of doing, any of the things above mentioned.[11]

(vii) *Sale and Lease of Lands, etc.*

1180. Parish Councils acquiring any lands or buildings under Part IV. of the Act of 1894 were empowered to let, sell, or exchange them, but the power of letting for more than a year, and the power of sale or exchange could not be exercised without the consent of the Central Authority, now the Department of Health for Scotland.[1]

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[1] Act of 1929, s. 1 (2) (*a*).

[2] Act of 1894, s. 24 (1) (*a*).

[3] See Act of 1894, s. 25, as to power to acquire land compulsorily.

[4] Act of 1894, s. 24 (1) (*b*).

[5] Cf. *Milne* v. *Inveresk Landward Committee*, 1899, 2 F. 283.

[6] Act of 1894, s. 24 (1) (*c*). See *Hope* v. *Inveresk Landward Committee*, 1906, 8 F. 896 (held that neither Parish Councils nor their Landward Committees had authority to litigate with regard to rights of way).

[7] Act of 1894, s. 24 (1) (*d*).

[8] Act of 1889, s. 105.

[9] *Scott* v. *Cargill Parish Council*, 1906, 23 S.L. Rev. 59.

[10] Act of 1894, s. 24 (1) (*e*).

[11] *Ibid.*, s. 24 (1) (*f*).

(viii) *Small Holdings.*

1181. A Parish Council might present a petition to the County Council with a view to bringing Part I. of the Small Holdings Act, 1892,[2] into operation. Where a County Council provides small holdings, it may delegate its powers under the Act to a committee of management.[3] The Parish Council were entitled to appoint two of their members to act on the committee in place of the elected members referred to in s. 24 (5) of the Act of 1894.

(ix) *Housing of the Working Classes.*

1182. Sec. 24 (6) of the Act of 1894, which gave Parish Councils the same power of making any complaint or representation as to unhealthy dwellings or obstructive buildings as was conferred on inhabitant householders by the Housing of the Working Classes Act, 1890,[4] was repealed by the Housing (Scotland) Act, 1925.[5] The matter is now regulated by s. 7 of the latter Act which authorised a Parish Council or the Landward Committee of any parish in the district of any Local Authority, not being a Town Council, to make a complaint in writing to the Medical Officer of Health regarding unhealthy buildings in the district, and by s. 14 (2) of the same Act which gave Parish Councils and Landward Committees similar powers of representation as to obstructive buildings. Power was also conferred on them to make a complaint to the Central Authority [6] where Local Authorities had failed to exercise their powers under the Act.[7] By s. 1 (2) of the Act of 1929 it is provided that any statutory provision empowering a Parish Council of a landward parish, or of a parish containing a landward part, to make a representation shall be construed as empowering the District Council [8] of the district to which the representation relates to make the representation. District Councils will accordingly be entitled to make the representations which such Parish Councils were empowered to make under the Housing Acts.

(x) *Acquisition of Land.*

1183. Where a Parish Council desired to acquire land, and could do so by agreement, s. 25 of the Act of 1894 provided that the Lands Clauses Acts [9] would apply, except those provisions relating to the purchase of lands otherwise than by agreement. If the Council could not obtain land for an authorised purpose on reasonable terms by agreement, they were empowered to make a representation to that effect to the County Council. The County Council were bound to inquire into the representation, and after certain procedure they might make an order putting in force, with respect to the land desired or any part of it, the provisions of the Lands Clauses Acts for the acquisition of land otherwise than by agreement. The order required to be confirmed by the Central Authority,[1] whereupon it had the effect of an Act of Parliament [2] Any parties whose interests might be affected were entitled to lodge objections with the Central Authority. District Councils are now entitled to make the representations which rural Parish Councils were formerly empowered to make.[3]

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[1] Act of 1894, s. 24 (2).

[2] 55 & 56 Vict. c. 31.

[3] *Ibid.*, s. 16.

[4] 53 & 54 Vict. c. 70.

[5] 15 Geo. V. c. 15, s. 120, and Sixth Schedule.

[6] Now the Department of Health for Scotland. See the Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34).

[7] 15 Geo. V. c. 15, ss. 18 (1), 40, 61.

[8] See Act of 1929, ss. 25 and 26.

[9] Lands Clauses Acts mean, as regards Scotland, the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), and the Lands Clauses Consolidation Acts (Amend-

(xi) *Maintenance of Public Ways.*

1184. Parish Councils were authorised to repair and maintain any public ways within their respective parishes except those highways and footpaths at the side of highways which the road authorities were bound to maintain. Public way includes a right of way not specifically acquired under s. 24 (*c*) of the Act of 1894. The expenses of such repair and maintenance were met out of the special parish rate,[4] now the District Council rate. But the exercise of this power did not relieve any other authority or person from any liability to repair or maintain these public ways, nor did it involve the Parish Council in any liability for damages owing to the condition of the road.[5]

SUBSECTION (2).—*Parish Trusts.*

1185. Part V. (*i.e.* s. 30) of the Act of 1894 relates to parish trusts [6] which, subject to certain exceptions, exist in the sense of the Act where trustees hold any property wholly or mainly for the benefit of the inhabitants of a parish or any of them, as such inhabitants, or for any public purpose connected with a parish. The exceptions are—

(1) Ecclesiastical charities.[7]

(2) Educational endowments within the meaning of the Educational Endowments (Scotland) Act, 1882; [8] and

(3) Property held for the use or benefit of the poor within the meaning of s. 52 of the Poor Law (Scotland) Act, 1845.[9]

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ment) Act, 1860 (23 & 24 Vict. c. 106), but the modifications made thereon by the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. V. c. 57), must be kept in view. See COMPULSORY PURCHASE, Vol. IV. para. 737, *ante*.

[1] Now the Department of Health for Scotland.

[2] Act of 1894, s. 25 (7).

[3] Act of 1929, s. 1 (2).

[4] Act of 1894, s. 27, as amended by Act of 1929, s. 26 (5); see para. 1194, *infra*.

[5] Act of 1894, s. 29.

[6] See definition of "Parish Trust" in Act of 1929, s. 77 (1).

[7] For definition see Act of 1894, s. 54, and *Bo'ness and Carriden Parish Council* v. *Bo'ness Kirk Session*, 1900, 2 F. 661; P.L.M. 1900, 314.

[8] 45 & 46 Vict. c. 59, s. 1.

[9] 8 & 9 Vict. c. 83. See *Auchtergaven Parish Council* v. *Auchtergaven Kirk Session*, 1901, P.L.M. 546. (Trust for poor held to fall under s. 30, Act of 1894, and not under Poor Law Act.)

In the case of parish trusts as thus defined, certain powers of administration were conferred on Parish Councils.[1] These included power to accept a transfer of the property held under the trust, if the council and the trustees agreed, and power in certain circumstances to appoint additional persons to act along with the trustees, in the event of the property not being transferred by agreement. The provisions of s. 30 with reference to the appointment of trustees do not, however, apply to any charity until the expiration of forty years from its foundation.[2]

1186. By s. 1 (2) (*b*) of the Act of 1929, the functions of Parish Councils under Part V. (or s. 30) of the Act of 1894[3] are transferred to and vested in the District Councils for the district except in the case of parish trusts relating to, *inter alia*, the poor. Accordingly the functions of Parish Councils relating to trusts for the poor are transferred to the County Council and the Town Councils of large burghs by virtue of s. 1 (1) (*a*) and (*b*) of the Act of 1929. Parish trusts relating to churchyards or to burial grounds will be administered by the County Council, the Town Councils of large and small burghs, according to which of these authorities has the administration of the churchyard or burial ground itself.[4]

Subsection (3).—*Allotments.*

1187. Sec. 77 (1) of the Act of 1929 provides that the expression "Allotments Acts" used therein means the Allotments (Scotland) Acts, 1892 to 1926.[5] The powers and duties of County Councils under the Act of 1892 were transferred to Parish Councils by s. 18 of the Land Settlement (Scotland) Act, 1919, which also enacted that the powers and duties transferred to or conferred on Parish Council by Part III. of that Act were to be considered as having been conferred on Parish Councils by Part IV. of the Act of 1894, *i.e.* on rural Parish Councils and Landward Committees. Accordingly, after 1919 the Parish Councils became the Local Authority for the administration of the Allotments Acts in rural areas, with powers to obtain land for allotments by compulsory acquisition in the event of their being unable to obtain it by agreement.[6]

Subsection (4).—*Registration of Clubs.*

1188. By s. 79 of the Licensing (Scotland) Act, 1903,[7] it is provided that the sheriff-clerk must give notice to the Parish Council of every application lodged for a certificate of registration of a club or for its renewal, where the club is situated outwith a burgh. The Parish Council might within 21 days [1] lodge objections to the grant or renewal of the certificate on certain specified grounds of objection.[2] The Sheriff, after hearing parties if objections are lodged, grants or refuses the application. The Parish Council were also empowered to raise a summary complaint against a registered club to have it found that the club was being so managed as to constitute a ground of objection to the renewal of its certificate.[3] If such a finding were pronounced, the Sheriff might cancel the certificate.[4] The Sheriff has power to award expenses against unsuccessful objectors or complainers. Such expenses in the case of a Parish Council were chargeable against the special parish rate, now the District Council rate.[5] See CLUBS.[6]

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[1] Act of 1894, s. 30.

[2] *Ibid.*, s. 30 (9); see also *M'Kune's Trs.* v. *M'Kerrow*, 1908, 16 S.L.T. 18.

[3] Other than subsection (6) of s. 30, which relates to the transference of churchyards from heritors to Parish Councils. See para. 1165, *supra*.

[4] See paras. 1161, 1165, *supra*.

[5] The Allotments (Scotland) Act, 1892 (55 & 56 Vict. c. 54); the provisions of Part IV. of the Act of 1894, which relate to allotments; Part III. of the Land Settlement (Scotland) Act, 1919 (9 & 10 Geo V. c. 97); the Allotments (Scotland) Act, 1922 (12 & 13 Geo. V. c. 52); and the Allotments (Scotland) Act, 1926 (16 Geo. V. c. 5), may be cited together as the Allotments (Scotland) Acts, 1892 to 1926 (s. 21 (1), Act of 1922, and s. 2 (1), Act of 1926).

[6] Allotments Act, 1922, s, 8, See Allotments, Vol. I. paras. 763 *et seq.*, *ante*.

[7] 3 Edw. VII. c. 25.

SUBSECTION (5).—*Post Office Guarantees.*

1189. Where the Parish Council of a landward parish or a Landward Committee considered that it would be for the benefit of their area that a post or telegraph office should be established, or additional postal or other facilities [7] provided, they were authorised to pay to the Paymaster-General any loss he might sustain by the establishment of the office or the provision of the facilities.[8] Any expenses incurred in pursuance of such an undertaking were defrayed as expenses incurred for the purposes of Part IV. of the Act of 1894, *i.e.* out of the special parish rate authorised to be levied by s. 27 of that Act, now the District Council rate.[9]

SUBSECTION (6).—*Representations.*

1190. Sec. 1 (2) of the Act of 1929 provides that any statutory provision empowering a Parish Council of a landward parish and of a parish containing a landward part to make a representation, shall be construed as empowering the District Council [10] of the district to which the representation relates to make the representation.[11]

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[1] 3 Edw. VII. c. 25, s. 79 (2), as amended by Temperance (Scotland) Act, 1913 (3 & 4 Geo. V. c. 33), s. 8 (2).

[2] Licensing Act, 1903, s. 81, as amended by 3 & 4 Geo. V. c. 33, s. 8 (4).

[3] Licensing Act, 1903, s. 85 (1).

[4] *Ibid.*, s. 85 (2).

[5] *Ibid.*, s. 79 (4) as modified by Temperance Act, 1913, s. 8 (3). As to special parish rate and District Council rate see para. 1194, *infra.*

[6] Vol. III. para. 944 *et seq.*, *ante.*

[7] This includes a telephone service.

[8] Post Office Act, 1908 (8 Edw. VII. c. 48), s. 49 (3), (8) (*a*) (*g*).

[9] As to special parish rate and District Council rate see para. 1194, *infra.*

[10] See ss. 25 and 26, *ibid.*

[11] See para. 1170, *supra*, and s. 42 (2) of the Act of 1894 (representation by Parish Council for the purpose of preserving rights of way); para. 1171, *supra*, and s. 44, *ibid.*, and ss. 122 and 131 of Public Health Act, 1897 (requisitions by Parish Council for formation of special districts for lighting, scavenging, public baths, wash-houses, drying grounds, drainage, and water); *ibid.*, ss. 22 and 36 (representations by Parish Council as to certain nuisances

SECTION 8.—FUNCTIONS NOW VESTED IN TOWN COUNCILS OF SMALL BURGHS.[1]

1191. The functions of Parish Councils in regard to burial grounds, churchyards, and crematoria within small burghs were not transferred to the County Council under the Act of 1929, but are now vested in the Town Council of the small burgh (proviso to s. 1 (1)). The Town Council of a small burgh will now exercise within their area all the powers conferred by the Burial Grounds Acts and the Cremation Act, 1902.[2]

SECTION 9.—RATES AND RATING.

SUBSECTION (1).—*Rates relating to Transferred Functions.*

1192. Prior to the coming into effect of the Rating (Scotland) Act, 1926,[3] Parish Councils levied the assessments sanctioned by the various statutes they administered. They also levied the education rate and handed over the proceeds to the Education Authority. By the Rating Act, Parish Councils ceased to be rating authorities as from 16th May 1927, and the funds required by them were obtained on requisition from the County Council in the case of landward parishes, the Town Council in the case of parochial parishes, and partly from each in the case of mixed parishes. Parish Councils had also no further concern with the levying of the education rate which was levied by County Councils and Town Councils over their respective areas. By s. 18 (1) of the Act of 1929 it is provided that any sums required to be raised by rate for the purpose of any function transferred by the Act must, notwithstanding any provision in any Act, be ascertained by reference to the expenses of the transferee authority in discharging the function throughout their area. This does not, however, apply to (*a*) any case with respect to which provision has been made by a local Act where the Secretary of State by Order so provides, or (*b*) the case of a special district rate. It is further provided by s. 18 (2) that the expenditure on functions transferred from Parish Councils must (so far as falling to be defrayed out of rates) be defrayed out of rates to be levied for the purpose in accordance with the provisions of the Act of 1929.

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and offensive trades), and para. 1172, *supra*, and s. 46, Act of 1894 (representation by Parish Council as to alteration of parish areas). See also para. 1182, *supra*, and ss. 7, 14 (2), 18, 40, 61, Housing (Scotland) Act, 1925 (complaints and representations by Parish Council as to unhealthy dwellings, obstructive buildings, failure by Local Authorities to exercise their housing powers). "Representation" is not defined in the Act of 1929. *Cf.* s. 6, Public Health Act, 1897 (Central Authority empowered to inquire into sanitary condition of any district on "written application" of a Parish Council), and s. 146, *ibid.* (If the Local Authority under Public Health Act neglected its duties the Parish Council was entitled to give "written notice" to such authority of the things neglected, and failing action being taken, the council could apply to the Sheriff.)

[1] For definition of "small burgh" see Act of 1929, s. 77 (1).

[2] See paras. 1152 and 1161–1166, *supra.*

[3] 16 & 17 Geo. V. c. 47.

SUBSECTION (2).—*Consolidated Rate.*

1193. All rates (*e.g.* rates for poor relief purposes, etc.) leviable by a rating authority[1] throughout the whole area of that authority must now be levied as one rate known as the consolidated rate, and must be divided between owners and occupiers in the same proportions as the total amounts of the separate rates would have been divided between owners and occupiers had they been separately levied.[2] Except where otherwise provided, all rates shall be payable by owners and occupiers in equal proportions. For other provisions as to the consolidated rate, see s. 19 of the Act of 1929.

SUBSECTION (3).—*Special Parish Rate.*

1194. The special parish rate leviable under Part IV.[3] of the Act of 1894 is now termed the District Council rate, and all expenses falling to be met by a District Council, whether under Part IV.[4] of the Act of 1894 or otherwise, must be defrayed out of the District Council rate.[5] The limit on the District Council rate is raised from sixpence in the pound to one shilling in the pound.[6]

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[1] "Rating authority" means, as respects the landward part of a county, the County Council, and as respects a burgh, the Town Council, and "rating area" shall be construed accordingly. Act of 1929, s. 77 (1).

[2] Act of 1929, s. 19 (1). For two exceptions to this, see provisoes (*a*) and (*b*) to s. 19 (1).

[3] *I.e.* under the Act of 1894, s. 27, as amended by the Third Schedule to the Rating (Scotland) Act, 1926.

[4] For Parish Council functions under Part IV. see paras. 1173 *et seq.*, *supra.*

[5] Act of 1929, s. 26 (5).

[6] *Ibid.*, s. 26 (6).

PARLIAMENT.

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SECTION 1.—GENERAL.

1195. The Legislature is technically known as the King in Parliament. In this sense the King is an essential part of Parliament; but, more popularly, the Parliament is distinguished from the Crown, and consists of the House of Lords and House of Commons. The legislative body of the present United Kingdom has carried on the history and tradition of the Parliament of England. After the Union of 1707 the united Parliament of Great Britain followed the rules and traditions of that of the larger kingdom; and the same is substantially true of the Parliament of the United Kingdom after the incorporation of Ireland in 1800. Since the excision from the United Kingdom of the Irish Free State the supreme Legislature of this country has been technically designed the "Parliament of the United Kingdom of Great Britain and Northern Ireland." [1]

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[1] Royal and Parliamentary Titles Act, 1927 (17 & 18 Geo. V. c. 4), and Royal Proclamation in Edinburgh *Gazette*, 13th May 1927.

SECTION 2.—DIVISION INTO TWO HOUSES.

1196. Parliament, in the popular sense as excluding the Crown, began to sit in two separate Houses at some unascertained date in the fourteenth century. For reasons which are still obscure, the burgesses and the knights of the shires came to sit together, separately from the Barons, and to form the House of Commons. But it is worthy of note that it was only for purposes of deliberation that they thus met separately. Legislation was achieved only "*in pleno parliamento*"; the enacting of laws was done in a meeting at which the King presided over the assembly of his Barons, with the Commons present but standing in the background. And so it is to this day. The giving of the "royal assent" to Bills is a ceremony at which the King (or, in modern practice, his Commissioners) is present in the House of Lords along with the members of the House of Commons (still standing in the background), thus emphasising the essential unity of Parliament when it achieves its primary purpose of legislation. Traditionally the enactment of laws required the threefold consent of King, Lords, and Commons. Apart from modern political changes which have vested the royal prerogative in the King's Ministers and thus eliminated the royal assent as a separate element, the greatest change in this rule is that embodied in the Parliament Act, 1911, by which the consent of the Lords has been rendered unnecessary for Bills complying with the requirements of that Act.[1]

SECTION 3.—POWERS AND FUNCTIONS.

SUBSECTION (1).—*Relations to Administration.*

1197. Neither in its collective capacity nor in its separate Houses is Parliament an executive body. Originally a law-making organ of the State, it has come by a long process of historical evolution to exercise important functions in the criticism and control of the Administration. The modern principle that the Executive requires to have the support and approval of Parliament, or more strictly of the House of Commons, arose historically from the necessity for the statutory sanction to all taxation, which rendered the Executive ultimately dependent on the Legislature. The modern system of party government, which requires the Administration to consist of leading members of a political party, has changed the relations between the Government and the House of Commons; and a political party now dominates both Legislature and Executive by obtaining a majority of members in the House of Commons. Both Houses, and especially the Commons, exercise a close scrutiny and a vigilant control over the King's Government by means of debates and resolutions. In this way they are assisted by the close association between the Government and the majority of the Commons. Both Houses are supplied by royal command with reports of Government

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[1] See CONSTITUTIONAL LAW, Vol. IV., *ante*, at p. 418.

Departments and of Commissions of Inquiry, whereby they may be kept informed of the actions of the Departments, and placed in a position to criticise and control.

SUBSECTION (2).—*Legislation.*

1198. Parliament is the Legislature for Great Britain and Northern Ireland (subject to a certain measure of self-government in the latter); but it has also the sovereign power of legislating for all parts of the King's Dominions.[1] Every legislative proposal is initiated by the introduction of a Bill containing the terms in which the new enactment is to be expressed. In early times (in England) the Commons were in the habit of initiating legislation by petition to the King; but, as the resulting enactment was framed by the royal officers and did not always correspond precisely with the desires expressed in the petition, they adopted about the beginning of the Tudor dynasty the practice of framing their proposals in the terms which they wished to have enacted; and these terms were called a Bill.[2]

SUBSECTION (3).—*Judicial.*

1199. The ancient function of the *Curia Regis*, as the supreme Court of the realm of England, came, after the separation of the Houses, to be vested in the House of Lords. After conflicts with the Commons in the seventeenth century, its limits were defined in two respects. Since the case of *Skinner* v. *East India Co.*[3] the House has not claimed an original jurisdiction, but has confined itself to the appellate jurisdiction which has never been disputed. Since *Shirley* v. *Fagg* [4] it has been recognised that the appellate jurisdiction extends to causes appealed from the Courts of Equity. In Scotland there had long been a controversy as to the jurisdiction of the Parliament in civil causes; but prior to the Union it had been well recognised that there resided in the Parliament a jurisdiction to entertain an appeal from the Court of Session by the process known as a protest for remeid of law. This differed from an appeal proper mainly in respect that it did not stop execution upon the judgment of the Session pending the hearing of the protest. After the Union with England, the British Parliament, in its judicial branch, the House of Lords, came in place of the extinct Scottish Parliament, and proceeded to hear appeals from the Court of Session. This course was not established without some controversy. The Articles of Union had clearly excluded all right of interference with Scottish judicial affairs by the "Courts of Chancery, Queen's Bench, Common Pleas, *or any other Court in Westminster Hall*";[5] but had left undefined any right which the Parliament of the United Kingdom, through the House of Lords, might have to hear appeals from Scotland. The practice soon grew up by which appeals were taken from the Court of Session in the same way as from the English Courts; but in connection with one of the earliest of such appeals the House of Lords laid down the rule that an appeal should have the effect of suspending execution of the judgment of the lower Court.[1]

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[1] See CONSTITUTIONAL LAW, Vol. IV., *ante*, at p. 420.

[2] For classification of, and procedure on, Bills, see para. 1233 *et seq.*, *infra*.

[3] 1666, 6 State Trials 710.

[4] 1675, 6 State Trials 1122.

[5] Art. 19 of Articles of Union, 1707.

SECTION 4.—COMPOSITION OF PARLIAMENT.

SUBSECTION (1).—*House of Lords.*

1200. The House of Lords, which is the "Upper House" in respect of rank and dignity, is composed of the following elements: Spiritual Lords, hereditary Peers of the United Kingdom, representative Peers of Scotland, representative Peers of Ireland, and life Peers appointed under the Appellate Jurisdiction Acts. The Spiritual Lords are all bishops of the Church of England. Occupants of the following sees are always members: the Archbishops of Canterbury and York, the Bishops of Winchester, Durham, and London. In addition to these there are writs of summons issued to twenty-one other bishops; but their selection does not depend upon the sees which they occupy. Upon the death or resignation of a bishop who has sat in the House, the vacancy is supplied by the issue of a writ to "that bishop of a see in England who having been longest bishop of a see in England has not previously become entitled to such writ." [2] Recent bishoprics have been generally established by statutes whose terms exclude the occupants from any claim to a seat.

(i) *Peers of United Kingdom.*

1201. The hereditary Peers of the United Kingdom are classified under the five orders of rank in the Peerage—Dukes, Marquesses, Earls, Viscounts, and Barons; but these are distinctions merely of rank and precedence, involving no distinction in their powers or functions as members of the House.[3]

(ii) *Scottish Representative Peers.*

1202. In terms of the Union between Scotland and England, the Scottish Peers, owing to their disproportionate numbers, were not admitted to the House of Lords, but were empowered to elect sixteen of their number to represent them in that House. These representative Peers are elected for the duration of the Parliament for which they are chosen: at every election of a new Parliament, therefore, there is an election of such representative Peers, which takes place at the palace of Holyroodhouse at a meeting of the Peerage summoned by royal proclamation during the General Election. These elected representatives have all the privileges of the hereditary Peers of Parliament. The returning officer is the Lord Clerk-Register. Voting is open, by signed lists; and proxies by absent Peers are allowed. Those entitled to vote are all Scottish Peers according to the list as it stood at the Union, whether they be Peers of the United Kingdom also or not. The list of Scottish Peers as at the Union was certified to the House of Lords by the Lord Clerk-Register in the "Union Roll"; but it was subsequently enacted in 1847 that no title standing in that Roll should be called at an election unless the holder had voted since 1800 until a direction should be given by the House of Lords.[1] That House, in disallowing a claim to a dormant title, may order that the title in question shall not be called at any subsequent election.[2] The Lord Clerk-Register, as presiding officer, has no title to determine questions which may arise on disputed claims to vote; he can only report to the House. The certificate of the election is transmitted to the Clerk of the Crown, and read at the opening of the new Parliament.[3]

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[1] Robertson's Appeal Cases, Preface, p. xiv. See also LORDS, HOUSE OF, Vol. IX., *ante*, at p. 325.

[2] 41 & 42 Vict. c. 68, s. 5.

[3] For the origins of the orders of nobility, see May, Parliamentary Practice, 13th ed., p. 9, and PEERAGE, *post.*

(iii) *Irish Representative Peers.*

1203. Representative Peers of Ireland, to the number of twenty-eight, are chosen by the Peerage of Ireland; but they are chosen for life. The statute by which the Irish Free State was set up [4] did not in terms restrict or abolish the right of the Irish Peerage to fill vacancies in the number of their representatives in the House of Lords; but the incidental abolition of the office of Lord Chancellor of Ireland,[5] through whom alone the writ could be issued, has prevented the filling of any vacancy since the institution of the Free State. One notable distinction between the Irish Peers and those of Scotland is that the former, if not elected as representatives to the House of Lords, are entitled to sit in the House of Commons, although not for Irish constituencies, while no Scottish Peer is eligible for membership of that House.

(iv) *Lords of Appeal in Ordinary.*

1204. The judicial functions of the House of Lords were not well provided for by its composition as it stood in the nineteenth century. Lay members had gradually been excluded by custom from taking part in judicial business; [7] and the supply of Peers of judicial experience was inadequate. In 1856 Queen Victoria, on the advice of her Ministers, bestowed on Sir James Parke, formerly one of the Barons of the Court of Exchequer, a barony, under the title of Lord Wensleydale, for life; but the Committee of Privileges of the House reported that the Crown had lost by desuetude the right of creating life peerages;[1] and a new patent was issued by which the barony was conferred in the usual form "in tail male." This difficulty in conferring life peerages on judges to enable them to perform the judicial functions of the House was removed by statute in 1876, when the Appellate Jurisdiction Act[2] empowered the Crown to appoint Lords of Appeal in Ordinary, each of whom should "rank as a Baron" and "be entitled to a writ of summons"; but his dignity as a Lord of Parliament should not descend to his heirs. The number of such Lords of Parliament was fixed at four;[3] but has since by amending Acts been increased to six (in 1913)[4] and now (in 1929)[5] to seven. The qualification required by the enabling statute is that the life Peer shall have held "high judicial office" for at least two years or have been in practice at the Bar of England, Scotland, or Ireland, for not less than fifteen years. Resignation does not terminate the rights and privileges of a Lord of Appeal; for after such resignation he is entitled to his seat and his vote in the House for the term of his life.[6]

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[1] Representative Peers (Scotland) Act, 1847 (10 & 11 Vict. c. 52), s. 1.

[2] Sec. 2.

[3] Standing Order (H.L.) 2.

[4] Irish Free State (Agreement) Act, 1922 (11 & 12 Geo. V. c. 4).

[5] 13 Geo. V. Sess. 2, c. 2, s. 2, Sched. II.

[6] See Lords, House of, Vol. IX. p. 326, *ante*.

(v) *Writ of Summons.*

1205. It is by an ancient practice of the Constitution that each Peer of Parliament is entitled to an individual writ of summons, which calls for his attendance on the day for which a new Parliament is summoned. But, as the Scottish representative Peers are chosen during the election and in a representative capacity, they do not receive such individual summons. The writ of summons, which has changed very little in form for many centuries, narrates the summons of a new Parliament, "enjoins and commands" upon the Peer "upon the faith and allegiance by which you are bound to Us, that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your counsel upon the affairs concerning Us, the state and defence of our United Kingdom and the Church."

(vi) *The Lord Chancellor.*

1206. The House of Lords has for its president or chairman the Lord High Chancellor or the Keeper of the Great Seal for the time being.[7] Until the beginning of the eighteenth century the holder of this office was sometimes a commoner; and in such circumstances he had no right to take part in debate or to vote; but since that time he has invariably received a peerage upon his appointment. His functions as chairman or speaker of the House do not involve the detachment and impartiality which are required of the Speaker of the House of Commons. The Lord Chancellor is a leading member of the Government, takes part in debates, and votes in the House. His principal function as chairman is to put the question to the vote; he has no power to enforce the rules of the House or to secure order in debate.

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[1] Life peerages seem not to have been unknown in early times, see May, Parliamentary Practice, 13th ed., p. 11.

[2] 39 & 40 Vict. c. 59.

[3] Secs. 6 and 14.

[4] 3 & 4 Geo. V. c. 21.

[5] 19 & 20 Geo. V. c. 8.

[6] 50 & 51 Vict. c. 70, s. 2, amending 39 & 40 Vict. c. 59, s. 6.

[7] The Lord Keeper of the Great Seal received his appointment by mere delivery of the Great Seal; the Lord Chancellor by patent. The former used to be appointed when there was no Chancellor; but no instance has occurred since the reign of George III. The powers and duties were assimilated by 5 Eliz. c. 18 (1562). See Introduction to Campbell's Lives of the Chancellors, at p. 20.

(vii) *Judges in the House of Lords.*

1207. By a very ancient practice of the English Parliament the King's judges were expected and required to give their attendance and advice in the House of Lords. Indeed, in early times they seem to have had the duty of drafting the laws, which were petitioned for by the Commons and assented to by the Barons. The modern equivalent of that function is that the English judges are supposed to be advisers or assessors of the Upper House. In connection with the judicial work of the House, this function has occasionally been used to enable the House of Lords as a Court of appeal to avail itself of the advice of the judges in cases of special difficulty or importance. The latest example of this consultation of English judges in purely judicial business in the Lords is to be found in the case of *Allen* v. *Flood.*[1] In the hearing of that appeal the English judges, by order of the House, attended throughout the hearing, and on a subsequent date delivered their considered opinions. The English judges, conform to that ancient practice of the English Parliament, are still summoned at the opening of a new Parliament to give their attendance and advice; but in practice their attendance is limited to such occasions of special summons as occurred in the case of *Allen* v. *Flood.*

1208. The Scottish judges did not sustain the same relation to Parliament as did the English; and therefore after the Union they had not the same claim to be summoned to meetings of the united Parliament, nor perhaps the same obligation to attend and give advice. But the English constitutional principle was soon applied, at least to a limited extent. Both in judicial and in legislative affairs, examples are to be found of the House of Lords invoking, or commanding, the assistance of the Scottish judges. In 1737, in connection with the debates which arose upon the trial of Captain Porteous, and the Bill of penalties against the City of Edinburgh, the Lords called for the attendance of the Lord Justice-Clerk and the other judges of the Court of Justiciary. They did not sit, like the English judges, within the Bar, but upon seats placed for them without the Bar. Questions relating to the conduct of the trial were propounded to them by resolution of the House and answered by them *seriatim*, beginning with the junior judge.[2] In the same year more abstract questions of law were similarly put to the Lords of

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[1] [1898] A.C. 1; see also 129 Lords' Journals 209.

[2] Lords' Journals, xxv. 99 *et seq.*

Justiciary relating to the liability of soldiers firing upon a riotous mob.[1] In connection with the more strictly legislative business of the House an example of the attendance of Scottish judges may be found in 1807. On considering a Bill for "better regulating the Courts of civil justice in Scotland" the Lords ordered the attendance of the Lord President and the two senior judges of the Court of Session. A long series of questions on the practice of that Court was submitted to them. Their answers were ordered on the following Monday; but on that day the Parliament was prorogued and then dissolved.[2]

SUBSECTION (2).—*House of Commons.*

(i) *Composition.*

1209. The House of Commons now consists of 615 members. All of them[3] except University members represent territorial constituencies. Many disqualifications which existed during a great part of our history have now been abolished. Thus the disqualification of women ceased by virtue of the Parliament (Disqualification of Women) Act, 1918;[4] the last of the many property qualifications which were for long demanded were abolished in 1858.[5] A long-standing, but generally disregarded, rule which required a member to be locally connected with his constituency was repealed as long ago as 1774.[6] But certain disqualifications remain. Since, at least, the time of the Act of Settlement aliens have been ineligible, although the former incapacity of naturalised persons no longer subsists.[7] Insanity is also a disqualification; and there are statutory means of unseating a member who has become insane.[8]

(ii) *Disqualification for Membership.*

1210. Peers are disqualified, except in the case of Irish peers to the extent mentioned above.[9] Judges of the supreme Courts of Scotland, England, and Ireland, also Sheriffs and County Court judges, are ineligible. Also, certain statutory provisions attach similar disabilities to the clergy of the established churches. Thus, by the House of Commons (Clergy Disqualification) Act, 1801,[10] no "priest or deacon" or "minister of the Church of Scotland" was capable of being elected, and such person sitting or voting was made liable to heavy penalties.

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[1] Lords' Journals, xxv. p. 102.

[2] 1807. Lords' Journals, xlvi. 172, 189.

[3] For modes of election, see FRANCHISE AND ELECTION LAW, Vol. VII. p. 188, *ante*.

[4] 8 & 9 Geo. V. c. 47.

[5] 21 & 22 Vict. c. 26.

[6] 14 Geo. III. c. 58.

[7] See British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 17), s. 3; and May, Parliamentary Practice, p. 30.

[8] May, *op. cit.*, p. 32.

[9] See para. 1203, *supra*. On the difficult question whether a peer's disqualification emerges on his succession to the title or on his receipt of a writ of summons, and as to his position between those dates, reference should be made to the Report of Select Committee on House of Commons (Vacating of Seats) 1894 (Cd. 278).

[10] 41 Geo. III. c. 63.

Similarly, by the Roman Catholic Relief Act, 1829,[1] Catholic priests were also disqualified. These disabilities remain, except that by the Clerical Disabilities Act, 1870,[2] provision was made whereby the members of the clergy of the Church of England might resign their "Orders," lodging such instrument of resignation in the Court of Chancery, and thereby relieve themselves of the disability. A minister of the Church of Scotland resigned his status as a minister in order to become a candidate at the election of 1929. He was unsuccessful; and on presenting a petition to the General Assembly he was readmitted to the status of a minister.[3] Persons holding contracts with Government Departments are disqualified from being elected, and from sitting or voting, under heavy penalties, by the House of Commons (Disqualification) Act, 1782;[4] but this has been held not to apply to contractors for Government loans.[5]

1211. Bankruptcy is a disqualification for being elected or sitting or voting in the House of Commons. The Court making the award of bankruptcy in the case of a sitting member is under obligation to intimate the award to the Speaker unless the disqualification is removed (presumably by discharge) within six months. On such notification the member's seat becomes vacant.[6]

1212. Persons attainted, or convicted of treason or felony, who have not purged the offence by undergoing the penalty or by a royal pardon, are ineligible for election.[7] Also, sitting members have not infrequently been expelled by the House in consequence of their conviction of crimes.[8]

1213. The long history of the position of holders of Crown offices in relation to eligibility for membership need not be considered here. Certain offices are incompatible with membership under a long series of statutes.[9] But the earlier rule that a sitting member accepting an office not so incompatible must vacate his seat, although eligible for re-election, was limited in 1919[10] by the exclusion of those appointed within nine months after the summoning of a new Parliament, and has now been completely abrogated.[11]

(iii) *Payment of Members.*

1214. In the early days of the English Parliament the representatives of the boroughs and the knights of the shires were paid by their respective constituencies; and this came to be a right recognised by the

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[1] 10 Geo. IV. c. 7.

[2] 33 & 34 Vict. c. 91.

[3] Pet. *Hamilton*; General Assembly Proceedings, May 1930.

[4] 22 Geo. III. c. 45.

[5] See May, Parliamentary Practice, on Rothschild's case, at p. 35.

[6] The Scots enactment is in ss. 183 and 184 of the Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), applying ss. 32 and 33 of the English Bankruptcy Act, 1883. See the case of Homan, Hansard, 6 Nor. 1928, vol. ccxxii. pp. 1, 2.

[7] *Tipperary* case, 1875, 3 O'M. & H. 19.

[8] May, Parliamentary Practice, 13th ed., p. 68.

[9] For which see Index to Statutes, *sub voce* House of Commons, 2 (*a*).

[10] Re-election of Ministers Act, 1919 (9 & 10 Geo. V. c. 2).

[11] Re-election of Ministers (1919) Amendment Act, 1926 (16 & 17 Geo. V. c. 19).

Courts and enforceable at law. In the seventeenth century, by which time membership had become no longer an irksome duty but a coveted privilege, the practice of demanding and receiving remuneration died out; and from that time onwards service was given gratuitously. In 1911 a change was made, and the present practice introduced. The House of Commons passed, in Committee of Supply, a vote of public money for the purpose of paying to each member of their House a salary of £400 a year, and this was embodied in the Appropriation Act. Such payments are not made to members who are in receipt of salaries as Ministers, officers of the House, or officers of the royal household.

1215. In the Scottish Parliament the principle was always recognised that the representatives of shires and burghs were entitled to some remuneration and also to their expenses. In the case of the commissioners for shires, provision was made in a long series of statutes from the fifteenth century that these commissioners should be paid; and the obligation to contribute was laid not only on the Crown vassals and those of the Prince of Scotland, who alone had a voice in the election, but also on the vassals of subject superiors. The statutes, however, provided no machinery for the recovery of the sums due, nor any specification of the rates of remuneration. Resort was had to the Privy Council, which prescribed rates and granted warrants for payment. In 1641 an important change was made by a statute which prescribed a rate of payment for each day of attendance and for days spent in travelling. This was apparently designed to check a growing tendency to slackness in attendance at the meetings of Parliament. But in the seventeenth century membership (as in England at the same time) was coming to be sought after as a privilege, with the result that the shires are found bargaining with their commissioners to take the duty without remuneration. The statutory provisions for payment to commissioners for shires had no application to the case of the commissioners for the burghs. Their remuneration depended upon burghal custom, and frequently was a matter of bargaining between the member and his burgh. In their case, also, the office came to be sought after during the seventeenth century, and competition for the honour enabled some burghs to obtain the services of their commissioners gratuitously.

(iv) *Resignation of Members.*

1216. A member of the House of Commons is not entitled to resign his seat.[1] The method whereby a member voluntarily retires from the House is to avail himself of the rule mentioned above which restricts the right of office-holders to sit in the House. He applies for, and receives as a matter of course, an office under the Crown which renders him disqualified to sit or vote. The office used for this fictitious purpose is generally that of Steward of the Chiltern Hundreds or of the Manor of Northstead. These are in the gift of the Chancellor of the Exchequer and are given for this purpose when desired by a member who wishes to resign his seat.

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[1] That a person elected may not decline to serve and may not resign seems to be a rule established in early times when membership was a burden and a duty performed often reluctantly. See Hatsell, Parliamentary Precedents, 1818 ed., vol. ii. p. 78.

(v) *Filling Vacant Seats.*

1217. A seat may be vacated by the method mentioned in the last paragraph, by death, succession to a peerage, or by incurring one or other of the disqualifications mentioned above. In any such case the Speaker is authorised by vote of the House to issue his warrant to the Clerk of the Crown for the issue from Chancery of a new writ of election for the constituency in question; but if the vacancy occur during a parliamentary recess, the Speaker has statutory power,[1] after he has given public notice in the *Gazette*, to issue his warrant to the Clerk of the Crown without a resolution of the House.

(vi) *The Speaker.*

1218. The proceedings of the House of Commons are presided over by the Speaker. The House elects its speaker, not on its own initiative, but on instructions from the Crown, and subject to the Crown's approval. On the meeting of a new Parliament the King (or more often the Lords Commissioners in his place) directs that "you, gentlemen of the House of Commons, repair to the place where you are to sit, and there proceed to the appointment of some proper person to be your Speaker; and that you present such person whom you shall so choose here (*i.e.* in the House of Lords) to-morrow for His Majesty's royal approbation." The subsequent expression of royal approval is essential to the validity of a Speaker's appointment. His appointment is for the duration of the Parliament in which he is elected; but for certain purposes he is, even after the dissolution, to be "deemed" to be Speaker until the election of a Speaker in the ensuing Parliament.[2] In the absence of the Speaker it used to be impossible for the House to do any business; but since 1855 provision has been made, first by standing order and then by statute,[3] for his place to be taken by the Chairman of Ways and Means. Extensive powers are conferred on the Speaker for the maintenance of order in the conduct of business, even to the "naming" of a recalcitrant member who has disregarded his authority, and who may then be suspended from the service of the House by resolution put without debate.

SECTION 5.—MEETING, PROROGATION, ADJOURNMENT, DISSOLUTION.

SUBSECTION (1).—*Dependence on Executive.*

1219. It was an outstanding feature of the English Constitution that the Legislature had no existence independently of the Crown. Parliament met only upon a royal summons, and ceased to exist not only by a royal dissolution but also automatically by the death of the Sovereign who had summoned it. With one exception that is true at the present time. In modern practice, the old Parliament is dissolved and the new one summoned by the same royal proclamation. This is issued under the Great Seal, by the advice of the Privy Council, generally after a prorogation, and in addition to dissolving the existing Parliament announces that the King has instructed the Lord Chancellor and the Governor of Northern Ireland to issue the necessary writs for the election of a new Parliament. The instant cessation of Parliament upon the demise of the Crown was found to have serious political disadvantages; and where the succession to the Crown might be challenged by subversive elements in the State, as upon the deaths of William III. and of Anne, provision was made by statute that the Parliament "continue . . . for and during the term of six months and no longer, unless the same be sooner prorogued or dissolved."[1] The limit of six months was removed by the Reform Act of 1867, which provides that the Parliament shall "continue so long as it would have continued but for such demise."[2] Moreover, the demise of the Crown provides another exception to the general rule of the dependence of the Parliament on the Crown. If a Parliament is in being, it must meet forthwith and in the absence of any summons;[3] and if the death occur after a dissolution but before the date on which the new Parliament is summoned to meet, then the old Parliament is revived and meets at once in similar automatic fashion.[4]

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[1] 24 Geo. III. Sess. 2, c. 26, amended by 26 & 27 Vict. c. 20.

[2] See 2 & 3 Wm. IV. c. 105; 9 & 10 Vict. c. 77.

[3] Deputy Speaker Act, 1855 (18 & 19 Vict. c. 84).

1220. Subject to these statutory limitations, it is still a feature of our constitutional law that the Legislature depends for its existence and continuance on the Executive. It resulted from this constitutional peculiarity that there were in earlier centuries constant attempts made to enforce on the Crown an obligation to hold frequent Parliaments. These became of less importance after the Revolution of 1688, because certain rules of law which were fixed by that event made it imperative that there should be annual meetings. Thus, by enacting the illegality of taxation without parliamentary authority, and the illegality of a standing army without similar authority, it became thenceforth necessary to hold annual sessions for the levying of taxes (so far as depending on annual statutes) and the provision for national defence. The question, however, which became important at that time was the duration of Parliaments, or the length to which a Parliament might run without being renewed by fresh elections. This was fixed at three years by the Triennial Act, 1694;[5] was altered to seven years by the Septennial Act, 1715;[6] and has now been fixed at five years by the Parliament Act, 1911.[7]

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[1] Succession to the Crown Act, 1707 (6 Anne, c. 7).

[2] 30 & 31 Vict. c. 102, s. 3.

[3] Succession to the Crown Act, 1707, s. 5.

[4] Meeting of Parliament Act, 1797 (37 Geo. III. c. 127), s. 3.

[5] 6 & 7 Wm. & Mary, c. 2.

[6] 1 Geo. I. stat. 2. c. 38.

[7] 1 & 2 Geo. V. c. 13, s. 7.

SUBSECTION (2).—*Meeting.*

1221. It is essential to the commencement of business by the assembled Parliament that the King shall first declare to each House the "causes of summons"; and this is done by a royal speech delivered either by the King in person or by commissioners on his behalf.[1] The causes of summons thus announced do not restrict the scope of the debates or business which may be undertaken; but each session of the Parliament requires this renewed royal sanction before it can proceed to business.

SUBSECTION (3).—*Prorogation.*

1222. At any time the Crown may bring the proceedings of Parliament to an end, without dissolving it, by prorogation. This may be achieved either by the royal command issued through the Lord Chancellor or by royal proclamation. The effect of such a royal proclamation is to bring the session to an end, suspending all current business except impeachments and the ordinary judicial work of the House of Lords.[2] Every Bill, therefore, which has been introduced falls upon a prorogation, and requires to be reintroduced and to pass through all its stages in a later session. On such a prorogation a date is normally fixed to which the Parliament shall stand prorogued; but, notwithstanding such date, the Crown may either further prorogue Parliament to a more distant date, which is now done by a simple proclamation with the advice of the Privy Council,[3] or may accelerate its meeting by a proclamation summoning it for the despatch of business on an earlier date, being not less than six days after the date of the proclamation.[4]

SUBSECTION (4).—*Adjournment.*

1223. This is a temporary suspension of the sittings of each House by its own resolution. Although there have been instances of adjournment on a recommendation from the Crown, no such royal intervention has occurred for more than a century. An adjournment does not have the effect of terminating the session or of quashing pending proceedings (as would a prorogation); and therefore the consideration of a Bill may be resumed at the stage at which it was left.

SUBSECTION (5).—*Dissolution.*

1224. A Parliament may cease to exist either through a dissolution by royal proclamation issued on the advice of the Prime Minister or through lapse of time when it has attained the limit of five years prescribed by the Parliament Act, 1911. The latter has never actually happened, and probably never will; for the Crown's advisers always anticipate the legal expiry by advising a dissolution at a chosen date. In modern practice a Parliament is not usually dissolved while it is actually in session; a prorogation usually precedes the dissolution. Although all current business naturally comes to an end with the termination of a Parliament, it has been the practice in the case of private bills and provisional order bills to give facilities to the promoters to proceed in the ensuing Parliament as if the procedure had been only suspended.[1]

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[1] For the abnormal procedure adopted during the mental incapacity of George III., see May, Constitutional History, i. 118.

[2] Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 8 and 9.

[3] Prorogation Act, 1867 (30 & 31 Vict. c. 81).

[4] 37 Geo. III. c. 127, amended by 33 & 34 Vict. c. 81.

SECTION 6.—PARLIAMENTARY PRIVILEGE.

SUBSECTION (1).—*Collective Privileges.*

1225. From very early times each House of Parliament has claimed and enjoyed certain collective privileges. The basis of these privileges was that, in order to its efficient working, the House in question should enjoy immunity from outside interference. These collective rights of the House as a whole were of an essentially political character, and consisted largely of the claim that its proceedings should not be interfered with by any act of the Crown. The principal of these "privileges" are to this day made the subject of a solemn claim addressed to the Crown at the opening of each new Parliament. One of the first duties of a newly-elected Speaker is to address to the Crown, immediately his appointment has been ratified, this claim to recognition of the privileges of the House. In a form which has hardly varied since the days of Henry VIII. he claims "their ancient and undoubted rights and privileges, particularly that their persons may be free from arrests and all molestations; that they may enjoy liberty of speech in all their debates; may have access to His Majesty's royal person whenever occasion shall require; and that all their proceedings may receive from His Majesty the most favourable construction." The invariable formula of the King's reply (delivered by the Lord Chancellor on his behalf) "confirms all the rights and privileges which have ever been granted to or conferred upon" the Commons by His Majesty's predecessors. Notwithstanding the humble form of the request and the gracious tone of the reply, the whole ceremony in truth reflects the issue of long and often bitter controversies between the Crown and the House in earlier times. The right of the House to conduct its debates without royal interference was not due to any voluntary grant from the Crown, but was won by a long constitutional struggle. The true basis of such privileges as the House and its individual members enjoy is to be found in immemorial usage which has grown into a recognised part of the Common Law. It is not to a royal grant, but to the *lex et consuetudo parliamenti*, that the House and its members look for the protection of their rights.

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[1] May, Parliamentary Practice, p. 810.

SUBSECTION (2).—*Privilege of Individual Members.*

1226. The same principle of non-interference by outside persons with the discharge of the duties of the House was early found to involve some immunity of individual members from anything which would restrict their liberty or disable them from discharging their parliamentary duties. Hence there arose the privileges of the private member.

(i) *Freedom of Speech.*

1227. In modern times the practical effect of this privilege is to protect members of either House from the civil consequences of defamatory words used by them in Parliament. No action of such a character will lie.[1] This privilege took on a new aspect when the House of Commons claimed that all publications made by its order were covered by the privilege, and that no action could lie at the instance of a person libelled against the printer or publisher of such a publication. In the case of *Stockdale* v. *Hansard*, arising out of the publication by the official printers to the House, or on their order, of a libellous report of the inspectors of prisons, Lord Chief Justice Denman directed the jury that "the fact of the House of Commons having directed Messrs. Hansard to publish all their parliamentary reports is no justification for them, or for any bookseller who publishes a parliamentary report containing a libel against any man." [2] As this statement of the law was subsequently affirmed by the Court of Queen's Bench, the Parliamentary Papers Act, 1840,[3] was passed to protect persons publishing by order of either House. By its provisions, any person against whom proceedings, either civil or criminal, are taken "for or on account of, or in respect of" the publication of any report, etc., by or under the authority of either House of Parliament may obtain a certificate from the Lord Chancellor or the Speaker, and on production of such certificate the proceedings shall be stayed.

(ii) *Freedom from Arrest.*

1228. This privilege, as now in force, is the residuum of the ancient immunity of all Members of Parliament (and at one time of their servants) from all legal process which restricted their personal liberty and prevented the performance of their parliamentary duties, except in so far as such restriction arose out of an accusation of treason, felony, or breach of the peace. The duration of the privilege was vaguely understood as covering members "when coming to Parliament, remaining there, and returning thence"; [4] and in later times the precise duration has not been specifically defined, although the English Courts have recognised that the immunity covers a period of forty days before a meeting of Parliament and forty days after a prorogation, and that this latitude is allowed even after a dissolution.[1] The privilege at one time protected members from all actions and from all executions or distress against their property; but, as a result of a long course of statutory modification, the privilege will not now protect against any action or suit at law except in so far as it may involve the arrest or imprisonment of the member's person.[2]

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[1] *Dillon* v. *Balfour*, 1887, 20 L.R. Ir. 600.

[2] 1837, 7 C. & P. 731, at p. 738; and in Q.B., 1839, 9 A. & E. 1.

[3] 3 & 4 Vict. c. 9.

[4] May, Parliamentary Practice, 13th ed., p. 111. Bacon's Abridgment: members are said to have privilege *eundo, morando, et redeundo.*

1229. There are, however, certain differences between the position of a member of the House of Lords and that of a member of the lower House. For in the case of a Peer there is a more extensive immunity from arrest, dependent on his status and not on his membership of the Legislature. All Peers of England were before 1707 privileged from arrest; and the same privileges were declared by Art. 23 of the Articles of Union to extend to Scottish Peers, and to Irish Peers (unless members of the House of Commons) by the terms of the Irish Union.[3] That this privilege depends upon status, and not on membership, appears from the extension of the immunity to Peeresses, whether by birth, creation, or marriage, and even to the widow of a Peer.[4]

1230. The same principle which required the full personal liberty of a member to attend to his parliamentary duties led in earlier times to the immunity of members from jury service and from attendance as witnesses in any Court; but the latter is now commonly waived, and the former has been made statutory in England,[5] although apparently still dependent in Scotland on the traditional law of Parliament. The above-quoted exception from privilege in cases of "treason, felony, and breach of the peace" has been construed in modern times to involve that the privilege may not be invoked in cases of arrest or imprisonment on any criminal charge; but it is the duty of the Court to communicate the fact of a member's imprisonment, with the cause thereof, to the Speaker. Commitment of a member for contempt of Court is now regarded as being in the same category as a criminal commitment,[6] and must be similarly intimated to the Speaker.

SUBSECTION (3).—*Enforcement of Privilege.*

1231. The claim has long been made by each House of Parliament that it alone can finally determine the scope and extent of its own privileges; and each House enforces through its own officers the penalty which it imposes for a breach. A breach of privilege is "contempt" and may be punished by the House as contempt of Court. This involved the right of the House to "commit," that is, to imprison, the offender; and this power is exercised indifferently whether the offending party be a member of the

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[1] *Goudy* v. *Duncombe*, 1847, 1 W.H. & G. 430; cp. Bell, Com. ii. 460.

[2] See especially 10 Geo. III. c. 50.

[3] 39 & 40 Geo. III. c. 67, Art. 4.

[4] *M'Donald*, 1756, Mor. 10031; May, Parliamentary Practice, p. 116. The Standing Orders of the House of Lords clearly distinguish Privilege of Parliament from Privilege of Peerage; see S.O. 58.

[5] Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9 and Sched.

[6] Precedents in May, *op. cit.*, p. 124.

House or not. It is this ultimate claim of the House to imprison offenders against their privileges which has led from time to time to a conflict between them and the Courts of law. The right to commit has indeed been repeatedly recognised by the English Courts. Treating the House of Commons as a Court, entitled to enforce its own dignity and to punish any insults and affronts, the Courts of common law have conceded the power of imprisonment.[1] Yet in other cases there has been a disposition on the part of certain judges to hold that they were entitled and bound, where an imprisoned person sought release by *habeas corpus*, to investigate the legality of the parliamentary proceedings, and to adjudge such proceedings to have been in excess of the powers of the House.[2]

1232. The House of Lords claims to be a Court of record; but Lord Kenyon said that in its legislative capacity it was not.[3] However that may be, the House imposes for breach of its privileges sentences of imprisonment for a fixed time, and also fines. The House of Commons adopts a somewhat different course. Although it claimed at one time to be a Court of record, and imposed fines for breach of privilege, it seems to have tacitly abandoned the claim [4] and has for two hundred and fifty years given up the practice. Apart from admonition and reprimand, the penalty imposed by that House is "commitment" to the custody of the Sergeant-at-Arms (*i.e.* an officer of the House) or to one of His Majesty's prisons, during the pleasure of the House. The imprisonment is not therefore for a definite term. It results from this difference in the conditions of the imprisonment imposed by the two Houses that in the case of the Commons a person committed by their order is liberated at the next prorogation, while imprisonment by the Lords for a fixed term does not cease with the parliamentary session.

SUBSECTION (4).—*Procedure and Discipline.*

1233. Both Houses claim, as one of their privileges, to exercise full control over their own procedure and discipline over their members. This right extends even to the right of expulsion of members. Cases have occurred in which the House of Commons has expelled members who had been convicted of crimes.[5] On one famous occasion that House went further than to expel, and declared the obnoxious member to be "incapable of being elected . . . in this present Parliament," and, on his again obtaining a majority of votes in his constituency, declared his opponent to be elected to the vacant seat. This was the climax of the persecution of John Wilkes in 1769; but the House in 1782 expunged the resolution from its records "as subversive of the rights of the whole body of the electors." If such a situation were to arise at the present time the position would be fundamentally changed by the fact that the House has given up its ancient claim to determine the validity of parliamentary elections. That right was long insisted on by the House, and was constantly abused; but by the Parliamentary Elections Act, 1868,[1] the adjudication of election petitions was assigned to a Court composed of judges of the High Court.[2] The exclusive right of the House of Commons to regulate disciplinary matters within its own walls has been fully recognised by the English Courts.[3]

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[1] A good example is *Burdett* v. *Abbot*, 1811, 14 East 1.

[2] See, *e.g.*, *Stockdale* v. *Hansard*, 1839, 9 A. & E. 1.

[3] *Flower's* case, 1799, 8 Term Rep. 314.

[4] And see Lord Mansfield's statement in *Jones* v. *Randall*, 1774, 1 Cowp. 17.

[5] See May, Parliamentary Practice, 13th ed., p. 624.

SECTION 7.—LEGISLATION.

SUBSECTION (1).—*Classification of Bills.*

1234. The principal classification of parliamentary Bills is that of Public and Private. The former, which are supposed to affect general matters of public policy, are introduced directly by a member of either House, while a Private Bill originates in a petition from the parties directly interested.[4] Personal Bills (a subdivision of Private Bills) are always initiated in the House of Lords.[4]

SUBSECTION (2).—*Procedure on Bills.*

(i) *Introduction and First Reading.*

1235. Any member of the House of Lords may introduce any Bill without notice. In the House of Commons a member may either present a Bill without leave or may move for leave to introduce it; but in either case notice must be given. In one case, however, there is an essential preliminary to the introduction of a Bill. If its effect is to impose a charge upon the people, then the rules of the House for legislation imposing taxation come into operation. If the main purpose is to impose such a charge, then there must precede the introduction a resolution of a committee of the whole House. If the public charge is only incidentally involved in the provisions of the Bill, the committee resolution need not precede its introduction but must precede the consideration in committee of such clauses as create the charges.[5] Upon leave being given for its introduction, a Bill is "read" a first time and ordered to be printed. The reading of a Bill consists in practice of the reading [6] of its short title by the clerk.

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[1] 31 & 32 Vict. c. 125.

[2] See FRANCHISE AND ELECTION LAW, Vol. VII., *ante*, at p. 326.

[3] *Bradlaugh* v. *Gossett*, 1884, 12 Q.B.D. 273.

[4] For Private Bills and Provisional Orders, see PRIVATE LEGISLATION, *post*.

[5] See NATIONAL FINANCE, *supra*, p. 153.

[6] Its short title is "read or supposed to be read," May, Parliamentary Practice, 13th ed., p. 385.

(ii) *Second Reading.*

1236. After a Bill has been read a first time, the appropriate motion is that it be read a second time. This stage is generally taken at a subsequent date, and after due notice. By that time the Bill has been printed, and this must be done in the form in which it was read a first time, with no other than clerical alterations. At this stage, the Bill, if affecting private rights, is submitted to the Examiners of Petitions for Private Bills with respect to its compliance with the Standing Orders relative to Private Bills. The second-reading stage of the Bill's progress is in some respects the most important; for it is at this stage that the general principle of the measure is supposed to be discussed and decided by the House. It is not in order at that stage to enter into the details and clauses of the Bill. By a curious convention of the House, the opponents of the Bill do not move a direct negative to the motion that it be read a second time, but move as an amendment that the Bill be read "three months" or "six months" hence, with the idea that the named period will be beyond the limit of the parliamentary session. The success of such an amendment is treated as the rejection of the Bill; and a measure which has received such treatment is not, in practice, replaced upon the Order Paper.

(iii) *Committee.*

1237. The next stage of a Bill's career, in passing through either House of Parliament, is its examination in detail by a committee of the House. Each House has its own system of committees; and in each there is a difference between the committee of the whole House and other smaller committees. The types of committees which are in use in the Commons' House will be considered later.[1] Upon the second reading of a Bill in the House of Lords the normal course is a reference to the committee of the whole House; and accordingly, if no motion is made for its reference to a "select" committee, the Bill is automatically "committed" to a committee of the whole House. In the House of Commons, on the other hand, the normal procedure is a reference to a standing committee; and this takes place in the absence of a resolution in favour of some other course. By a practice initiated in 1907 a Public Bill, other than a Money Bill, is committed to a standing committee unless the House order otherwise. The motion required if this normal course is not to be adopted is either that the Bill be sent to a committee of the whole House or to a select committee. If a Bill relate exclusively to Scotland (which is finally determined by the Speaker), it goes to the Scottish standing committee; otherwise it is allocated to one or other of the standing committees of the House. The normal purpose of the committee stage is that the Bill may be discussed in detail, with full opportunity for members to move such amendments as they may desire. But the amendments which are competent in committee are limited to those which are within the scope of the Bill as described by its title.[1] To obviate this limitation, and to give greater scope to the committee, it is necessary that when a Bill is "committed," an "instruction" shall be given to the committee.

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[1] See para. 1245 *et seq.*, *infra.*

1238. The purpose of an "instruction" to the committee is to enable it to extend the scope of the Bill, or even to extend its operation to cognate subjects. But it is not a competent instruction which proposes that the committee may "engraft novel principles into a Bill." [2] If the title of the Bill limit its operation to some part of the United Kingdom, the committee may not extend its operation to other parts; but an instruction to enable it to do so would be in order.

(iv) *Report Stage.*

1239. Upon the conclusion of the proceedings of the committee, the normal course of procedure is that the chairman of the committee "reports" the Bill as amended to the House. In the Lords this may not be done on the same day on which the committee concludes its deliberations; but in the House of Commons the report may be made forthwith. It then falls to the House to consider the Bill as reported to it by its committee. If substantial amendments have been made, the Bill is reprinted. The amendments which are competent in the House on report stage are limited to those which would have been competent to the committee without a special "instruction," and (subject to this limitation) include the proposal of new clauses. One of the motions which are competent at this stage is that the Bill shall be recommitted in whole or in part to a committee of the whole House or to a select committee. In practice Bills have sometimes been sent back to committees several times by this system of recommittal.

(v) *Third Reading.*

1240. The final stage of a Bill's progress through either House is its third reading. This is now often taken immediately after the consideration upon report, or upon its being reported without amendment, as the case may be. At this final stage, the Bill may of course be negatived on a division; but with reference to the amending of it the rules of the two Houses differ considerably. In the House of Lords new clauses may be inserted and amendments made; but by the Standing Orders of the lower House none but verbal amendments may be proposed. A third reading given to a Bill now involves that it passes that House; but this was not always so. A subsequent formal motion that "the Bill do pass" was formerly made; and (though still recorded in the Journals of the House) this motion is not now made.

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[1] *I.e.* the full title printed on the back of the Bill; not the "short title" by which it subsequently comes to be known.

[2] On this whole subject, reference should be made to May, Parliamentary Practice, 13th ed., p. 398 *et seq.*

(vi) *Communication to the other House.*

1241. If a Bill has originated in the House of Lords, it is sent to the Commons through the Clerk of the Parliaments with a request for their concurrence. In similar form the Commons send their Bills to the Lords with a request for their concurrence. Whatever passage to and fro between the Houses may be required before the ultimate concurrence of the two Houses is secured, the Bill must ultimately be returned to the Lords' House, for that is the place of custody for Bills [1] until they have received the royal assent.

(vii) *Disagreeing with Amendments.*

1242. When a Bill is returned to the House of its origin with amendments proposed by the other House, it is open to the House of origin to accept the amendments or to disagree with them or some of them. But there must be agreement to the last detail before the Bill can be presented for the royal assent and become a statute. One class of amendments requires a separate mention. If an amendment by the Lords create or alter any charge upon the people either by way of general or of local burden it is regarded by the Commons as an infringement of their privileges; and the message from the House of Commons expressing their disagreement with the amendment is in such a case confined to the statement that the Lords' amendment infringes the privileges of the lower House and that it is unnecessary to give other reasons for the disagreement. Such a claim to privilege is generally accepted by the Lords as sufficient. The former practice of having conferences between the two Houses in cases of prolonged differences has been given up for many years. "Under the existing practice, the Bill goes backwards and forwards until an agreement is arrived at, or is found to be impracticable. In the latter case the Bill drops." [2]

(viii) *Royal Assent.*

1243. When the two Houses have agreed upon a Bill in all its details, nothing remains to make it an Act of Parliament except the royal assent. This form, as it has now become,[3] represents what was at one time the assent of a separate and independent will. But the position of the Crown in our present Constitution, and particularly the peculiar relations of the Crown and the Ministers, has rendered this stage of parliamentary procedure no more than a form. The assent is given orally, either by the King in person or by commissioners specially authorised by him for the purpose. The traditional form of such assent was the meeting of the *plenum parliamentum*, the King, Lords, and Commons, assembled in one place, and the verbal expression of the Sovereign that he assented to the Bills to which the respective Houses had agreed in their separate meetings. Since the reign of Henry VIII. the practice has grown up of the Sovereign sending his commissioners to meet his assembled Houses, and to indicate to them his concurrence in their legislation. The validity of this mode of procedure was thought to require statutory warrant; and its legality was solemnly affirmed by Act of Parliament.[1] The commission, in terms of that Act, is still signed by the King "with his own hand." The modern form of intimating the royal assent consists in the appearance of the royal commissioners in the House of Lords, to whose presence the Commons are duly summoned, and the announcement by them on the reading of the titles of Bills that "Le Roy le veult." Such is the form in the case of an ordinary Public Bill; but the form is adapted to different kinds of Bills. Measures granting supplies to the Crown for the public service, which receive priority at the ceremony, receive the assent in the ancient formula: "Le Roy remercie ses bons sujets, accepte leur benevolence, et ainsi le veult." In the case of a private Bill the form is: "Soit fait comme il est desiré." The commission granted by the Crown for giving the royal assent contains the titles of the Bills for which the royal assent may be given. The actual expression of the assenting formula is uttered by the Clerk of the Parliaments. In the case of the King being present in person to give the assent, the formula is still uttered by the Clerk of the Parliaments, and the Sovereign makes "a gentle inclination, indicative of consent."[2]

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[1] Except in the case of Money Bills which remain in the charge of the House of Commons until the royal assent is given.

[2] Ilbert, Legislative Methods and Forms, 1901, p. 104.

[3] The last Bill which failed to receive such assent was a Militia Bill for Scotland, to which Queen Anne refused her assent.

1244. The royal commission for giving the royal assent is contained in Letters Patent under the Great Seal. It appoints commissioners "to declare and notify this our royal assent in our absence in the said Higher House, in the presence of you the said Lords and Commons of our Parliament, there to be assembled for that purpose; and the Clerk of our Parliaments to endorse the said Acts with such terms and words, in our name, as is requisite for the same; . . . And finally we do declare and will, that after this our royal assent given and passed by these presents, and declared and notified as is aforesaid, then and immediately the said Acts shall be taken, accepted, and admitted good, sufficient, and perfect Acts of Parliament and laws, to all intents, constructions and purposes, and to be put in due execution accordingly, the continuance or dissolution of this our Parliament, or any other use, custom, thing or things, to the contrary thereof notwithstanding."

SECTION 8.—PARLIAMENTARY COMMITTEES.[3]

1245. In the House of Lords the important types of committee are the committee of the whole House and select committees. The more important Bills concerned with questions of public policy are generally remitted to a committee of the whole House. The select committee is normally used in matters in which inquiry by evidence of witnesses is desired; and this may be either a Bill or a matter of administration on which the House desires to conduct an investigation. There are also joint committees of the two Houses, to which each House sends its appropriate contingent. These sometimes form an expeditious method of inquiry, dispensing with the need for a separate investigation by each House.

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[1] 1541, 33 Henry VIII. c. 21. ss. 3 and 4.

[2] May, Parliamentary Practice, p. 434.

[3] For committees on Private Bills, see PRIVATE LEGISLATION.

1246. In the House of Commons, the normal procedure in legislation is (as already mentioned) that a Bill is sent to one of the standing committees which are set up at the beginning of the session. These are six in number, and include the Scottish committee, to which all Bills applicable only to Scotland are referred. The last named consists of all the members for Scottish constituencies along with certain other members not exceeding fifteen in number. The other standing committees consist of not less than forty nor more than sixty members. If a public Bill relating exclusively to Wales and Monmouthshire is sent to such a committee, the membership must include all members representing Wales and Monmouthshire. The alternative to considering a Bill in a standing committee is its reference to either a committee of the whole House or a select committee. Speaking generally, the chief distinction is that the former exists for deliberation, the latter for inquiry. A committee of the whole House always considers matters of taxation and of granting of public money.[1] Also, all questions which, in the opinion of the House, may be best considered in committee will be treated in that way; and the more important Public Bills dealing with large questions of public policy will, or may, be remitted to a committee of the whole House. On the other hand, a select committee is primarily designed to take evidence, contains normally not more than fifteen members, and has power to send for papers and records, and may cite witnesses and take their evidence on oath in conformity with the Parliamentary Witnesses Oaths Act, 1871.[2] Sittings of such select committees are usually held in public; but the exclusion of strangers may be ordered at any time. If secrecy is obviously essential to the nature of the inquiry, the House will appoint a secret committee, from which even other members of the House are excluded.[3] The method of joint committees is a modern revival of an ancient practice. Either House may propose the institution of such a committee by appointing a certain number of its members and inviting the other House to appoint a like number. In modern practice the Houses enjoy equal representation on a joint committee. Its report is presented to each House separately.[4]

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[1] See NATIONAL FINANCE, *supra*, p. 153.

[2] 34 & 35 Vict. c. 83.

[3] For precedents, see May, Parliamentary Practice, p. 477.

[4] For joint committees under the Private Legislation Procedure (Scotland) Act, 1899, see PRIVATE LEGISLATION, *post*.

SECTION 9.—JUDICIAL WORK OF HOUSE OF LORDS.

SUBSECTION (1).—*Appellate Jurisdiction.*

1247. The important judicial work of the House of Lords in modern times is confined to its appellate jurisdiction, which is treated elsewhere.[1]

SUBSECTION (2).—*Trials of Peers for Crimes.*

1248. It is one of the oldest privileges of the Peers of the Realm that they are entitled to be tried by their Peers in all the major charges of crime which may be brought against them. This privilege, which had long been traditional in England, was extended to the whole Scottish Peerage by the terms of Union in 1707, and to the Peers of Ireland in 1800. In determining the scope of the privilege, however, it seems necessary to interpret in terms of Scots law the English definition of treason and felony. Minor offences, known in English law as misdemeanours, are triable in the case of Peers as in the case of Commoners. The original definition of the scope of this privilege (as first applied in Scotland) was contained in 6 Anne c. 23, s. 12, and was subsequently interpreted by 6 Geo. IV. c. 66 (1825) to mean "all treasons, misprisions of treason, murder and other crimes which infer a capital punishment by the law of Scotland, and all felonies and other crimes for which if committed in England a Peer of the United Kingdom would be tried by his Peers." By the last-mentioned Act the trial, though conducted in the House of Lords, is to be governed, in respect of relevancy, evidence, punishment, and so forth, by the law of Scotland (s. 5), and to that end the Scottish judges may be summoned by His Majesty to attend the trial. The tribunal, during the sittings of Parliament, is the House of Lords under the presidency of the Lord High Steward; and, when Parliament is not in session, the Court is not technically the House of Lords, but the Court of the Lord High Steward, consisting of all lay members of that House duly summoned to attend. In the former case the Lord High Steward votes with the other Peers; in his own Court sitting in vacation he gives directions on points of law as a judge, but the verdict is given by the other Peers. The Bishops, who are not Peers, but only Lords of Parliament, do not have the privilege of being tried by the Peers. Yet as members of the House they are entitled to sit in the House of Lords when it is engaged in trying a Peer. If the trial takes place before the Court of the Lord High Steward they are not summoned to attend. In the event of their being present as members of the House they are allowed, or perhaps required, to retire before the final vote is taken, in conformity with the old ecclesiastical law by which they take no part in "a question of the loss of life or limb."

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[1] See LORDS, HOUSE OF, Vol. IX. p. 323, *ante*.

Subsection (3).—*Impeachment.*

1249. Another ancient jurisdiction of the House of Lords relates to the procedure by impeachment. It dates from the early days of the English Parliament, has not been invoked since the trial of Lord Melville in 1805, and may perhaps never be revived. The procedure is one of trial by the House of Lords on an accusation brought by the lower House. Its historical origins are probably to be found in the difficulties involved in bringing persons of great social and political importance before the ordinary Courts of law, and partly also in the need of bringing to trial the King's Ministers on accusations for political offences which would be of doubtful relevancy by the ordinary criminal law of the land. All persons, whether Peers or Commoners, are liable to this jurisdiction. The accusation must be initiated by the House of Commons. A member brings the charge, whether of treason or of some other high crime and offence, before the notice of that House, and moves that the person be impeached. If the House accept the motion, a committee is appointed to draw up the indictment, which is technically known as the "Articles of Impeachment." These are delivered to the Lords, served on the accused, answered by him, and, if necessary, supplemented by replications by the committee.

1250. When the trial takes place before the House of Lords, and the accused is a Peer, the House is presided over by the Lord High Steward, appointed *ad hoc* by the Crown on an address from the Lords; if the accused be not a Peer, the Lord Chancellor may preside at the trial. In the meantime the House of Commons has appointed "managers" to prepare the evidence and to conduct the prosecution. These managers lead their evidence in support of the charges contained in the Articles, and the accused leads his evidence in defence. Upon the conclusion of the evidence and speeches, the Lord High Steward, or other presiding Peer, puts the question of "Guilty" or "Not guilty" to each member of the Court in turn, beginning with the junior in rank; and, when the numbers have been ascertained, the president intimates the result of the vote. No sentence follows upon a conviction unless the House of Commons formally asks for it. If the Commons so resolve, the Speaker at a subsequent diet, in the name of the Commons, demands judgment on the accused, and the Lord High Steward pronounces the sentence resolved upon by the Peers. An impeachment instituted by the House of Commons was held in the seventeenth century not to fall by a prorogation of the Parliament;[1] and finally to survive even a dissolution of the Parliament.

1251. The Act of Settlement, 1700,[3] attempted to resolve a long-standing constitutional controversy by enacting "that no pardon under the Great Seal of England be pleadable to an impeachment by the

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[1] Decided in *Danby's* case, 1684.

[2] Warren Hastings, 1791.

[3] 12 & 13 Wm. III. c. 2.

Commons in Parliament." This, however, meant only that such a pardon was not pleadable in bar of trial. The royal right of pardon of any convicted person was not interfered with; and after trial and sentence that right survives in the case of an impeachment as in other cases.[1]

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[1] For examples of such pardons, see May, Parliamentary Practice, p. 653.

PARLIAMENTARY CHURCHES.

See CHURCH.

PARLIAMENTARY ELECTION.

See FRANCHISE AND ELECTION LAW.

PAROCHIAL BOARD.

See PARISH COUNCIL.

PAROCHIAL RELIEF.

See POOR LAW.

PAROLE EVIDENCE.

See EVIDENCE.

PART AND PERTINENT.

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SECTION 1.—GENERAL ASPECTS.

SUBSECTION (1).—*Definition and Classification.*

1252. Professor G. J. Bell gives [1] the following definition: "parts and pertinents are such accessory parts and fixtures and appendages to lands or houses, or such separate possessions or privileges, as accompany the occupation and use of the land or have for forty years [2] been so enjoyed along with it." This definition has reference to competition of heritable titles, and it is usually in that relation that the expression "part and pertinent" is used in the institutional writers, and by modern text writers and in legal phraseology generally. But the same legal conception operates in other connections also, of which the following are examples: (1) the interpretation of contracts for the sale and purchase of heritable property, to determine the extent and terms of the conveyance which the purchaser is entitled to demand and the seller bound to grant; (2) succession cases, both intestate and testate, including the construction of testamentary writings as regards the extent of legacies whether made direct or through the medium of trustees; (3) assignations of debts, secured or unsecured; and (4) what may be called commercial pertinents; this last is a class of great importance, coming into question often in the case of large commercial transactions such as sales of businesses. It may be novel to have these extensions referred to as branches of the law of parts and pertinents, but in principle that is their nature. Most of the illustrations of this class relate to incorporeal rights, but the expression "parts and pertinents" has always included rights of that nature, *e.g.* servitudes.

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[1] Bell's Prin., s. 739.

[2] Sec. 740.

SUBSECTION (2).—*Part or Pertinent.*

1253. The following quotations from Bell's Principles are relevant on the relation between part and pertinent: (1) "accessory parts";[1] (2) "among pertinents mines of minerals and coal and quarries of limestone, marble, freestone, etc. are included";[2] (3) "woods and trees are pertinents, or rather parts, of the land on which they grow";[3] "separate tenements . . . may become pertinents of an estate in land by possession as such during the term of prescription."[4] This last means that, though a piece of land has been a *separatum tenementum* by express infeftment in favour of A., it may become part and pertinent of B.'s lands by prescriptive possession.[5]

1254. There is obviously something inconsistent in regarding a title as (first) disponing "all and whole" the lands of X., and (second) also expressly giving, or otherwise implying, a disposition of "parts" of those same lands in addition to the "whole" already expressly disponed. This difficulty has been experienced judicially;[6] it appears to affect the matter of prescription; and it may be that it has not even yet been fully and finally explored.[8] But the retention of the word "part" in the expression "part and pertinent" is useful as a reminder that the acquisition of property in this manner is not limited to cases where the quality of accessory can be predicated of the alleged acquisition in relation to the property to which an express title is produced. On this aspect of the matter the case of *Lord Advocate* v. *Hunt*[1] has probably been to some extent misunderstood.

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[1] See para. 1257, *infra*. [2] Bell's Prin., s. 739. [3] Sec. 741. [4] Sec. 746.

[5] *Young* v. *Carmichael*, 1671, Mor. 9636.

[6] See Lord Johnston in *Duke of Argyll* v. *Campbell*, 1912 S.C. 458, and contrast with *Auld* v. *Hay*, 1880, 7 R. 663.

1255. It sounds strange, nowadays, to read that a disposition of lands carries the buildings on the lands, but a perusal of the old case of *Downie* v. *Alexander*[2] shews that there is a sense in which a question of that kind might even now arise. In that case A. had, on the marriage of his daughter B., disponed a building site to her in liferent if she survived her husband C., and to C. and his heirs in fee. C. built on the site and then became bankrupt. On his death his creditors claimed to exclude the rent of the building from B.'s liferent. The claim was based on revocation of a donation between husband and wife, and it failed. But even yet in the same or somewhat similar circumstances there might be room for a challenge under the bankruptcy Acts or at common law. Such cases may also explain the common references in dispositions to buildings erected or "to be erected" on the lands disponed.

1256. The distinction between part and pertinent is in an old case[3] related to the element of discontiguity. The defender having pleaded that the pursuer could not succeed in his claim because of discontiguity, the latter's reply was that the discontiguity could not be found relevant to make the rig of land in dispute cease to be pertinent of his property, seeing albeit it might thereby appear not to be part thereof, yet it remained a pertinent thereof.

1257. On consideration it will be seen that Bell's description of "accessory parts" can be much more readily predicated of some things than of others. Take, for instance, teinds and salmon-fishings. The former, whether held on independent title as a "separate tenement" or not, must always be the teinds of certain identifiable lands, from which in that sense they can never be dissevered, even though the lands and teinds are in, or pass into, different ownerships. But salmon-fishings may be the fishings of the lands of X. one day and may become the fishings of the lands of Y. the next day, the truth being that they have no necessary or inherent connection with any lands, contiguous or discontiguous, though it may (or may not) be that the exercise of the fishing right requires the use of the bank on one or both sides. Examples intermediate between the cases of teinds and salmon-fishings are orchards and drying-greens for clothes. These are natural adjuncts, the one of a mansion-house and the other of any house, rural or urban. Bell writes:[4] "orchards, though lying discontiguous from the principal subject, are held to be pertinents." This is true of other things than orchards, but the point is that, as one would naturally expect to find a mansion-house provided with an orchard, if the only orchard is discontiguous, it will readily be held to pass as a pertinent. The same is (or was) so true of a drying green for any dwelling-house, that it is suggested below[5] that it may well form an exception to the rule of bounding titles. As to orchards there is an old case [1] in which it was held that they are covered by the general word "yards," sustaining the argument that "either that word or '*horti*' (so-called *quod ibi arbores et olera oriuntur*) comprehends gardens and orchards, and that we are not to think *pomarium* or orchard to be a distinct species from *hortus* because mentioned together in charters, seeing synonymous words are frequently added in charters."

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[1] 1867, 5 M. (H.L.) 1; see para. 1293, *infra.*

[2] 1777, Mor. 6316; also "Implied Assignation," Appendix.

[3] *Forsyth* v. *Durie*, 1632, Mor. 9629.

[4] Bell's Prin., s. 742.

[5] Para. 1286, *infra.*

SECTION 2.—CONTRACTS FOR SALE OF HERITAGE.

SUBSECTION (1).—*Alienability.*

1258. Property and rights may in this connection be distinguished according as (1) it is incompetent to alienate them at all or in the circumstances; (2) they may be alienated, but must be expressly conveyed; (3) they pass by implication, but may be expressly reserved; or (4) they pass by implication, and it is incompetent to reserve them.

SUBSECTION (2).—*Inalienable Rights.*

1259. This class includes the following, viz. (1) all the *regalia majora*—as to the effect of a Crown charter of minerals *inter regalia* to an entail proprietor, see the case cited; [2] (2) certain of the *regalia minora*, viz. navigable rivers and highways; [3] (3) as to the bed of the sea beyond the foreshore, and the minerals under it, see the case cited.[4] (4) It appears that it is incompetent to communicate water rights to non-riparian owners when third parties are interested to object.[5] This would apply to (*a*) the case of the proprietor of an estate with a river frontage attempting to communicate a right to water supply from the river on a feu or sale of part of the estate not abutting on the stream; and (*b*) the case of a proprietor of an estate on the shore of a loch attempting to communicate a right of boating or trout-fishing on the alienation of a part of the estate not abutting on the loch.[6] In the case cited the contest was between a disponee of a small part and a singular successor in the estate. It was held that the privilege of trout-fishing could not be maintained against the singular successor. It was, however, indicated that, if there had existed the relation of superior and vassal, the result might have been different. There was no question with proprietors of other estates fronting the loch. But of course contracts with reference to all such rights are binding between the parties to them and their heirs (not being heirs of entail) and gratuitous disponees, and statutory successors may also be bound.[7]

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[1] *Bruce* v. *Dalrymple*, 1709, Mor. 9638.

[2] Ersk. ii. 6, 17 ; Bell, Convey., p. 606.

[3] *M'Adam* v. *Cathcart*, 1908, 16 S.L.T. 234.

[4] *Lord Advocate* v. *Wemyss*, 1899, 2 F. (H.L.) 1.

[5] Rankine, Land-Ownership, p. 554.

[6] *Patrick* v. *Napier*, 1867, 5 M. 683.

[7] *Wemyss Water Trs.* v. *Lawson*, 1924, S.L.T. 162.

SUBSECTION (3).—*Rights which Require to be Expressly Conveyed.*

(i) *General Enumeration.*

1260. This class includes the following: (i) teinds; but this is subject to important qualifications; see TEINDS;[1] (ii) *regalia minora.* Bell lays it down[2] that *regalia minora,* even when granted by the Crown to a vassal, are held not to be transferred by the vassal "unless expressly mentioned." These rights include salmon-fishings, ports, ferries, foreshores, wreck, mussel scalps, and oyster-beds. Of these the one of most practical importance is salmon-fishings, as to which see FISHING;[3] (iii) claims of damages against third parties for prior injury to the property;[4] (iv) claims for compensation under the Lands Clauses Act for previous injurious affection of the property;[5] (v) collateral obligations and rights of relief against parties other than the superior;[6] (vi) unpaid price of road rights; and (vii) moveable effects such as fittings. The two last-mentioned items may be separately dealt with.

(ii) *Unpaid Price of Road Rights.*

1261. In the case cited,[7] road trustees had taken a certain part of an estate for the purpose of a road; and the road had been formed, but the price had been neither paid nor fixed. On a sale of the estate in this position of matters, without any exception from the lands or from warrandice, and with a statement of the full original acreage, it was held that the unpaid price of the road did not pass to the purchaser. It was observed that the form of the title granted to the purchaser was justifiable without holding that it carried that price, for he got the *solum* of the roadway and the right to require that the surface should be used as a road.

(iii) *Moveable Effects.*

1262. Moveable effects are not strictly relevant in this connection, but their practical importance makes it desirable to refer to them. As to what is and is not heritable between seller and purchaser, see FIXTURES.[8] Mistakes are apt to occur through the missives of purchase omitting to mention fittings. The consequences may be serious, and the results are, in some instances, peculiar. Thus take the case of a tenement purchased for investment. Before the date of the sale the houses are all let, and the sale is subject to the existing tenancies; there is an omission to specify fittings in the offer; the results are, the fittings do not pass to the purchaser; he cannot be compelled by the seller to buy them; it does not appear that either seller or purchaser, or both, are entitled to remove them until the existing tenancies have expired, for the tenants have rented the subjects with the fittings and cannot be required to submit even to the inconvenience of one set being removed and another substituted. Apparently, therefore, the purchaser must either buy the fittings from the seller and pay for them over and above the price of the property, or he must allow the seller to receive some proportion of the rents, as effeiring to the fittings, until the tenancies respectively expire, when the seller will be entitled to remove them. But, especially in the case of investment purchases, where rental is one of the main points in the transaction, the fittings would, it is thought, be deemed to pass.

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[1] See also paras. 1276, 1302, *infra.*

[2] Bell's Prin., s. 743.

[3] See Vol. VII. p. 109, *ante*; see also para. 1266, *infra.*

[4] *Burrell* v. *Simpson & Co.*, 1876, 4 R. 177; *M'Bride* v. *Caledonian Rly. Co.*, 1894, 21 R. 620.

[5] *North British Rly. Co.* v. *Budhill Coal Co.*, 1909 S.C. 277.

[6] *Welwood's Trs.* v. *Mungall*, 1921 S.C. 911.

[7] *Kelvinside Estate Co.* v. *Donaldson's Trs.*, 1879, 6 R. 995.

[8] See Vol. VII. p. 149, *ante.*

1263. The legal attachment of moveables to heritage receives interesting illustration and extension in certain statutory cases. Thus, under s. 23 of the Burgh Police (Scotland) Act, 1903,[1] authorities in burghs have power in certain circumstances to compel the owners of houses at their own expense to supply and maintain portable ashbins. These remain the property of the owners, but it appears that a contract for the sale of the heritage would carry the ashbins by implication. The same tendency of administration receives even stronger illustration in the case of what are called farmed-out houses. The owners of houses of that character are bound to supply and maintain equipment of table, chairs, and numerous other moveable articles, amounting to the irreducible minimum of what is required to make the house a furnished house. Enactments on that subject are found in ss. 5 to 23 of the Glasgow Corporation Order, 1918, and by s. 48 of the Housing, Town Planning, etc. (Scotland) Act, 1919,[2] power is conferred upon authorities in burghs to adopt those sections of the Glasgow Order, subject to the approval of the Department of Health for Scotland. All that equipment remains the property of the owners of the houses. On the one hand it may seem incongruous that a contract for sale of a tenement of houses, at a stated price, should by implication include articles of the nature mentioned; but, on the other hand, the fact remains that those articles are dedicated to the heritage by the owner acting under statutory compulsion. It is not probable that sales of such property will take place without the position as to that equipment being made express between seller and purchaser. The rental element might be very misleading.

1264. In connection with all this class, *i.e.* things which may be alienated, but must be expressed, an express clause should be inserted in the contract; and further, the terms of the clause will require attention to secure (*a*) that it gives the purchaser all he relies upon, and (*b*) that it does not commit the seller to selling what is not his. Thus the simple clause "with fittings" may leave many questions as to whether the purchaser is entitled to claim what he expected; and on the other hand, in the case of a tenanted house, it may commit the seller to the position of selling all the fittings, while in point of fact some of them may belong to the tenant.

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[1] 3 Edw. VII. c. 33.

[2] 9 & 10 Geo. V. c. 60.

1265. When creditors are selling under power of sale in heritable securities, it is important to observe that probably they have no power to sell the fittings. That may depend on various elements, *e.g.* whether there is a clause of fittings in the bond; whether the creditor took possession before sequestration; and whether the fittings have been put in by the creditor during his period of possession in due course of administration. The like question arises in cases of foreclosure.

(iv) *Salmon-fishings.*

1266. It is not known that there is any decision on the question whether a contract for the sale of an estate to which is attached a right of salmon-fishing includes that right by implication. Such a case rarely, if ever, arises. Salmon-fishings are prized independently of their commercial value, and it must rarely happen that even the most casual missive or correspondence of purchase contains nothing expressly or by implication to settle the question. In like manner it is inconceivable that this sporting feature should be omitted from any estate particulars or advertisement. In many cases a clear indication would be derived from the figures of rental or rates.

1267. It is further suggested that the result may be different according to the locality of the fishings or the nature of the title. The strongest case for implied inclusion of the salmon-fishings in the sale is when the water is contiguous to the land, and the seller's title to the fishings rests on prescription without express mention of salmon-fishings. Having contracted to sell "the estate of X.," it is thought that he must convey what is in his title;[1] and further, that that conveyance carries all that has accrued to the seller, not only by the bare title, but also by aid of the added force of prescription. If this doctrine or rule has never been declared, it is thought that that is simply because it has always been assumed and acted on in relation to rights of all kinds, in the absence of express exception in the contract.

1268. A case at the other extreme is presented when the sale is of "the estate of X.," and the facts are that the seller holds two titles, one to "the lands of X.," and a separate one, obtained at a different time and from a different author, to fishings, higher or lower on the river, and described in that title as the "fishings of Y." Let it be that the two have been possessed together for the prescriptive period, that the fishing is of little value, and has formed in fact a sporting adjunct of the estate of X. The Dunfermline Palace case[2] is taken to shew that the fishing has not been possessed as part or pertinent of X., seeing that it is demonstrated that the possession has been on a separate title.

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[1] *Houldsworth* v. *Gordon Cumming*, 1910 S.C. (H.L.) 49.

[2] *Lord Advocate* v. *Hunt*, 1867, 5 M. (H.L.) 1.

SUBSECTION (4).—*Rights which Pass if not Reserved.*

(i) *Gables.*

1269. Where the seller has right to recover from an adjoining proprietor one-half of the cost or value of a mutual gable, that right is by implication carried by a disposition of the seller's property, and in proportion if only part of the seller's property is sold.[1] That is not the usual intention; and when it is not, both the contract and the disposition ought to contain an express reservation, the terms of which require care.[2] If on the other hand the right is intended to be carried, the better practice is to make that express.

(ii) *Minerals.*

1270. Where the superior has reserved the minerals and thus holds (*a*) the property of the minerals, and (*b*) a superiority *quoad ultra*, when the superiority comes to be sold, if care be not taken, occasion may be given for serious dispute as to whether the minerals are included in the sale. This confusion is hardly likely to occur in the contract of sale if in a simple form, for there the subject of sale will probably be described as a superiority or feu-duty, neither of which could include the minerals. The confusion comes in through the ordinary form of a conveyance of a superiority, which is in form a grant of the lands themselves.[3] Minerals being a part of the lands, a purchaser of land will not in ordinary circumstances be bound to proceed if it appears, after the contract has been entered into, that the seller cannot give a title to the minerals. And even in the case of a villa residence, a reservation of the minerals with power to work them, would imply a state of matters inconsistent with the peaceful enjoyment of such a purchase, and would entitle the purchaser to resile. There is indeed a case which goes further than this, and in which it was held that a purchaser of a villa was not bound to proceed when the title disclosed a reservation of the minerals to the superior, who, however, was prohibited from working them without the vassal's consent. Including the Lord Ordinary, the judges were equally divided.[4] The latest case is *Mossend Theatre Co.* v. *Livingstone.*[5]

(iii) *Servitudes.*

1271. Servitudes do not require express assignation;[6] but when a servitude is constituted by deed, and probably a recorded deed, it is expedient to add an express reference to it.

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[1] *Hunter* v. *Luke,* 1846, 8 D. 787.

[2] *Berkeley* v. *Baird,* 1895, 22 R. 372; *Baird* v. *Alexander,* 1898, 25 M. (H.L.) 35.

[3] *Orr* v. *Mitchell,* 1893, 20 R. (H.L.) 27.

[4] *Whyte* v. *Lee,* 1879, 6 R. 699.

[5] 1930 S.L.T. 108.

[6] Bell's Prin., s. 745.

(iv) *Burgh of Barony.*

1272. In the case cited [1] the successful pursuer had argued that in an infeftment of an ordinary holding, without erection into a barony, burghs of barony cannot be conveyed under the name of parts and pertinents; yet they are all carried *in baronia* without being expressed. The judgment was that "this being a barony may carry a burgh of barony as part and pertinent though not expressed, albeit it was expressed in a former infeftment, and though lesser rights are expressed in this infeftment."

Subsection (5).—*Rights which Cannot be Reserved.*

(i) *Burial Ground.*

1273. The burying-ground in the parish churchyard allocated to the property passes as a pertinent. The purchaser of the lands cannot be excluded from right of burial, but the seller's family grave is not forthwith to be disturbed.[2] A purchased right of interment in the churchyard does not pass as a pertinent.[3]

(ii) *Water Rights.*

1274. On the sale of an estate abutting upon but not entirely surrounding a loch, it appears to be incompetent for the seller, retaining no land fronting the loch, to reserve to himself right of trout-fishing or boating in the loch; and even if the land did wholly surround the loch, while such a reservation might be effectual as between (*a*) superior and vassal in favour of the former, who would not be divested, and (*b*) even as between disponer and disponee in favour of the former, it appears that in the latter case it would not be effectual against a singular successor in the property.[4]

Subsection (6).—*Competent Evidence.*

1275. Questions regarding the extent and terms of the disposition to which the purchaser is entitled must be determined by the terms and incidents of the contract of sale and purchase. The contract may be contained only in correspondence; or the correspondence may refer to a rental, or advertisement or other particulars, or a plan; or such papers may have been communicated; or there may be references to verbal explanations or to an inspection at which the boundaries and rights were pointed out and explained; or such preliminaries may have in fact occurred. The rule of law is that, notwithstanding that a formal contract has subsequently been entered into, it is competent to found on all such preliminaries, not to contradict the contract, but to establish what it is that is the subject-matter of the contract.[1] No doubt it must be competent to exclude that rule of law by express agreement, but it is probable that any case in which it could be held that that had been effectually done would be found to be one in which, in the formal contract, it was further agreed what should be the terms of the actual disposition. That is frequently a judicious method to adopt, as, for example, when an estate is being split up or a house has been divided and is being sold off in flats. It may be accomplished by clauses *in gremio* of the contract, but the most thorough way is to have the actual draft disposition (lacking it may be purchaser's name, etc.) signed as relative to the contract. In minutes of sale and articles of roup it is common to find a condition that it shall not be competent to refer to particulars or information given publicly or privately by the seller, but a condition of that kind is usually annexed to a different kind of clause, namely, the clause requiring the purchaser to take the property and the title as they stand. In a case of that kind, if the other clauses come up to the standard of a prescribed form of disposition, *cadit quæstio*; if, not, then the rule of law stated in *Houldsworth* v. *Gordon Cumming*[1] will apply.

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[1] *Earl of Argyle* v. *Campbell*, 1668, Mor. 9631.

[2] Ersk. ii. 6, 11; *Ure* v. *Ramsay*, 1828, 6 S. 916; *Steel* v. *St. Cuthbert's Kirk Session*, 1891, 18 R. 911.

[3] *Steel* v. *St. Cuthbert's Kirk Session*, *supra*.

[4] *Patrick* v. *Napier*, 1867, 5 M. 683.

SUBSECTION (7).—*Rental Imported.*

1276. A rental is always a valuable adjunct of missives of sale, whether formal or informal. Indeed it might be supposed that it would be practically conclusive of what was, or was not, intended to be included in the sale. But there are rentals and rentals, and there are also different purposes of reference to a rental; a rental may even introduce difficulty.[1] Where the rental is that of stock and teind, as it commonly is, that is probably conclusive that the teinds are included;[2] besides, what is called a rental usually contains particulars of deductions, and if these include stipend, that tells in the same direction, stipend being a burden on teind and not on stock. The rental factor applies also in regard to steelbow,[3] of which nearly the only surviving trace is the obligation, sometimes placed on a tenant, to leave, without payment, the straw of his waygoing white crop.[4]

SUBSECTION (8).—"*Parts and Pertinents*" *in the Contract.*

1277. It is not uncommon to insert in the contract the words "with parts and pertinents." It has been judicially said that a conveyance of the lands of X. is as wide as the like conveyance with the addition of parts and pertinents.[5] But it is significant that in nearly every decided case, if parts and pertinents have been expressed, that fact has been judicially emphasised. In the case of houses it must be most exceptional that the presence or absence of those words can make any difference, but in the case of land proper it is thought to be better to express parts and pertinents in the contract. At most, however, those words secure that, if a right exists as a part or pertinent, the purchaser is entitled to it; they do not of themselves entitle him to any remedy if something which he may have relied on obtaining as a pertinent is not the seller's to convey.

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[1] *Houldsworth* v. *Gordon Cumming*, 1910 S.C. (H.L.) 49.

[2] *Dunning* v. *Crs. of Tulliboall*, 1748, Mor. 6307.

[3] Ersk. ii. 6, 12.

[4] See LEASE, Vol. IX. p. 102, *ante*.

[5] *Gordon* v. *Grant*, 1850, 13 D. 1.

SUBSECTION (9).—"*Extension*" *of Contract in Disposition.*

1278. The case of *Houldsworth* v. *Gordon Cumming* [1] reads as authority for the view that if the contract is for the sale of "the estate of X.," then, if the transaction is to proceed, what the purchaser is entitled to receive, and must accept, is a disposition of that estate as described in the seller's title. Cases differ so much in their circumstances, and in the terms and conditions of the contract, that it is not very helpful to endeavour to deal with specialties which may arise. There does not appear to be any modern decision on a claim by a purchaser that an area which is understood to be part of the property sold, but the title to which rests on the basis of part and pertinent, shall, in the disposition in favour of the purchaser, be elevated to the position of a separate parcel, or at least shall in one way or another be expressly specified in the description. There are two old cases [2] of that kind, in both of which such a claim by the purchaser appears to have succeeded. In one case the parties had signed a minute of sale of the lands of X.; the purchaser claimed that he was entitled to receive a title to a right of common pasturage in the discontiguous moor of B., which was not specified in the existing title, and that in the disposition in his favour the minute of sale should be "extended and perfected" so as to convey that right expressly. The seller tendered a disposition of "the lands of X. with parts, pendicles, and pertinents"; but in reply the purchaser refused "to accept of lands with a plea." The decision was that the minute of sale ought to be extended, bearing expressly the common pasturage on the moor of B., "in respect the same was a pertinent of the lands, sold the time of the bargain, and was not excepted." The other case related to the form of implementing a decree-arbitral pronounced by Sir Hugh Dalrymple, Lord Northberwick, President of the Session. The decree-arbitral bore that the disposition should be of "the house and yards of X.," upon which the Court decided that a discontiguous orchard was to be included in the disposition.[3]

1279. Notwithstanding *Houldsworth's* case it is here suggested that on the sale of a property, if the title tendered to something which is admittedly within the purchase is as part and pertinent, perhaps discontiguous, the purchaser is entitled to have that part elevated to the position of a distinct parcel, or at any rate to have words added which will identify it and expressly convey it. The position is very clear if it be assumed either that the part which rests on part and pertinent is the only part which is being sold, or that the whole is being sold except that part. In the former case there must clearly be a new description. The latter case is rather more troublesome, and in order to leave the seller with a satisfactory express infeftment (or, indeed, with any infeftment at all) in the reserved part, the course suggested is that he should first execute in his own favour a disposition of the whole with a specific description of the pertinent as a separate parcel, and then convey to the purchaser the rest but not that parcel. There may be other situations, *e.g.* where part of the express lands in the existing title is being sold and part retained, or where the whole is being sold but in parts to two or more purchasers, and in any of those cases the "part and pertinent" may be going wholly to any of the parties or it may be intended to be split up among two or more of them. Once the main or express lands are severed, a question which may be well-nigh insoluble arises regarding the ownership of the part and pertinent, unless that is expressly dealt with, and this requires a new description or new descriptions.[1]

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[1] 1910 S.C. (H.L.) 49.

[2] *Borthwick* v. *Lord Borthwick*, 1668, Mor. 9632; *Bruce* v. *Dalrymple*, 1709, Mor. 9638.

[3] See para. 1257, *supra*.

SUBSECTION (10).—*Warrandice.*

1280. In regard to the matters discussed in the preceding paragraphs the real point of difference between seller and purchaser is on the obligation of warrandice. The seller seeks to retain nothing; he is quite willing to convey all he has; but he is unwilling to incur absolute warrandice as regards property or rights which rest only on part and pertinent. The purchaser's attitude, on the other hand, is that he considers that he is buying and paying for the property or rights in question, and that the seller must not only denude, which might amount to no more in effect than *non repugnantia*, but that he must dispone, and in such form that his warrandice shall clearly and expressly attach.

SUBSECTION (11).—"*Contraction*" *of Contract in Disposition.*

1281. On the other hand the question may in some circumstances arise whether the seller is entitled to have the description in the missives contracted in the disposition. This is the converse of the purchaser's claim to have the description in the missives extended in the disposition as referred to above. No claim for contraction can be entertained if the extent and effect of the missives are clear. But if the missive is ambiguous it may be that the seller is not bound to sign a disposition which will perpetuate the doubt and run the risk of litigation, perhaps after onerous third parties have acquired interests. An instance which has occurred in practice is a contract for sale of a croft or small holding bounded by a loch, the contract being silent on the subject of inclusion or exclusion of rights in the loch. Even if it could be proved that neither party had any water rights in view, it seems difficult to force on the purchaser any variation of the missive which will deprive him of the loch boundary or of its consequential pertinent rights in respect of the loch, though that may involve rights of boating and fishing over the whole of a large loch as a pertinent of a small arable or pasture holding. It seems proper here to note that the mere fact that a piece of land is bounded by a loch does not necessarily prove that the owner has in respect of that land any rights in the loch. That follows from the legal possibility of the whole rights in the loch being attached to land discontiguous from the loch or to someone without relation to any land at all.[1]

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[1] Cf. *Pattison* v. *Macindoe*, 1883, 20 S.L.R. 615.

1282. The ordinary case, however, is that land fronting a loch carries rights in the loch as pertinents. Any difficulty arising in such a case, on the sale of a small holding or any small part of the estate adjoining the loch, may be obviated by prescribing, in the contract of sale, a boundary which stops short of the loch, so that the property sold has no frontage to the loch, and the strip abutting on the loch is retained by the seller. So far from the point of view of the seller. On the other hand there are cases where, from the point of view of the buyer, it is, on a balance of considerations, desirable to define the subject of purchase so as to avoid running up to such a boundary as a river or a wall; for instance, an existing march dyke. Boundaries of that character carry responsibilities for the maintenance of the river bank or the march dyke, and there are occasions on which it is seen to be judicious to leave those responsibilities with the seller, by expressly curtailing in that direction the subject of purchase. The like consideration may weigh still more forcibly in the case of the constitution of security rights.

SECTION 3.—COMPETITION OF HERITABLE RIGHTS.

SUBSECTION (1).—*Title.*

(i) *Infeftment.*

1283. The Act 1617 c. 12 applies, and there must be infeftment as the basis of title.[2]

(ii) *Terms of Title.*

1284. It is not necessary that the title should contain the words "parts and pertinents" or "pertinents."[3] Whether a clause of parts and pertinents be present in or absent from A.'s title, it is not fatal to his claim that the infeftment of his competitor B. includes the disputed property *per expressum*; possession will decide.[1]

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[1] *Stewart's Trs.* v. *Robertson*, 1874, 1 R. 334.

[2] *Dunbar* v. *Sinclair*, 1714, Mor. 9640, 10817; *Brand* v. *Charteris*, 1841, 4 D. 292.

[3] *Gordon* v. *Grant*, 1850, 13 D. 1, at p. 7.

(iii) *Bounding Titles.*

1285. There is authority that a bounding title precludes the acquisition, as part and pertinent, of any corporeal property beyond the bounds,[2] but not incorporeal rights beyond the bounds such as salmon-fishings [3] or servitudes.[4] It may, however, be questioned whether, notwithstanding this rule, prescriptive possession of a proper pertinent though beyond the bounds may not give a title to it.[5]

1286. Take the case of a house described as being on the third or top flat of the tenement. That appears to be a bounding title as regards everything that is not on the third or top flat.[6] But if the fact be that, though not mentioned in the title, there is a cellar in front and a common green behind, and both of these have been possessed with, and as pertinent to, the house, could it be said that the title was not sufficient to support the possession? Or, to take an instance more exactly fitting in with the usual examples of bounding titles, suppose the house is described as lying on the east side of a certain street, and, though not mentioned in the title, the fact is (as sometimes happens) that there is a cellar or a common drying- and bleaching-green on the west side of the street appropriated to the tenement and used as such, could it be successfully maintained that the possession was useless because the rule of bounding titles excluded corporeal pertinents beyond the bounds? There is no attempt to extend or alter the bounds. The bounds remain in force as identifying and bounding the main property, which remains to the end as at the beginning, and it is to that property that the pertinents are attached.

1287. But while this opinion is suggested, it is recognised that there appears to be much authority against it. The case of *Gordon* v. *Grant* and the prior case of *Hepburn* [7] are, however, discounted by the fact that in both of them the title expressly limited not only the lands but also the pertinents to a specified parish, which was held conclusive against the acquisition of corporeal pertinents beyond that parish. The Lord Justice-Clerk (Hope) stated [8] "to that parish all the accessory rights, privileges, and pertinents are also expressly limited," and referred to the fact that the same limitation of pertinents was found in *Hepburn*. Other cases are *Young* [9] and *Magistrates of St. Monance.*[10] In the former an infeftment in property described as on the east side of King's close was held fatal to a claim to "a piece of ground on the west side of the close," but it does not appear that there was anything in the character of the ground or its use to make it an ordinary and natural supplement and pertinent to the main property. The *St. Monance* case seems stronger, for in it a claim to a "lumber-house" was similarly rejected, but the lumber-house was merely an incident of the claim, which went much further.

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[1] *Earl of Fife's Trs.* v. *Cuming*, 1830, 8 S. 326; *Meacher* v. *Blair Oliphant*, 1913 S.C. 417.

[2] *Gordon* v. *Grant*, 1850, 13 D. 1, at p. 7; *Downie* v. *Alexander*, 1777, Mor. 6316; *Lord Advocate* v. *Hunt*, 1867, 5 M. (H.L.) 1.

[3] *Earl of Zetland's Trs.* v. *Tennent's Trs.*, 1873, 11 M. 469.

[4] *Beaumont* v. *Glenlyon*, 1843, 5 D. 1337.

[5] *Cooper's Trs.* v. *Stark's Trs.*, 1898, 25 R. 1150, per Lord M'Laren at p. 1169.

[6] *Watt* v. *Burgess' Tr.*, 1891, 18 R. 766.

[7] *Hepburn* v. *Gordon*, 1823, 2 S. 459.

[8] *Gordon* v. *Grant*, *supra*, at p. 5.

[9] *Young* v. *Carmichael*, 1671, Mor. 9636.

[10] *Mags. of St. Monance* v. *Mackie*, 1845, 7 D. 582.

(iv) *Relation of Dispositive Clause to* Tenendas.

1288. Erskine writes:[1] "everything which from its close cohesion or connection with land is considered in law as part or pertinent of it goes to the vassal as an accessory of the subject contained in the feudal grant. Most of these are, however, anxiously enumerated in the *tenendas* of every charter." Menzies[2] puts it antithetically thus: "Whatever is part and pertinent of the lands conveyed is carried by the charter although it be not mentioned, and anything which is not part and pertinent cannot be transmitted by the insertion of it in the *tenendas*, the latter clause being merely explanatory of the dispositive." But he qualifies it thus:[2] "At the same time, while the *tenendas* cannot transmit a right it may in some cases raise a presumption in favour of the grantee, so as to entitle him to establish a right by evidence of possession; but it is certain that without such possession no right is conferred."

1289. The *tenendas* clause is the proper place for the specification of pertinents.[3] This is an important rule. It may be that it is based on the theory that the description in the dispositive clause is sufficient to carry or support all the parts and pertinents expressed in the *tenendas*, and this appears to have been Erskine's view in the passage quoted above. When it is found that salmon-fishings may be included as pertinents[4] it is suggested that a question of importance might arise on a conflict between the one rule that pertinents may, and naturally do, appear only in the *tenendas* clause, and the other rule that a real burden, to be effectual, must be in the dispositive clause.[5] Assuming the clauses in an old deed to run in the following order—(1) dispositive clause of "the lands of X"; (2) real burden for £1000; (3) *tenendas* with salmon-fishings—does the real burden affect the salmon-fishings? It is suggested that it does, if the fishings have never been a "separate tenement," in which case the *tenendas* may be taken as merely making express (in terms or by reference[6]) that the intention is to carry what the dispositive clause is in itself habile to carry.

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[1] ii. 6, 4.

[2] Menzies, Convey., p. 529.

[3] Cf. *Lord Advocate* v. *Sinclair*, 1865, 3 M. 981; 5 M. (H.L.) 97; *Lord Advocate* v. *M'Culloch*, 1874, 2 R. 27.

[4] *Smith* v. *Ballingal*, 1895, 2 S.L.T. 503.

[5] Bell's Prin., s. 920; Lord Shand in *Cowie* v. *Cowie's Trs.*, 1893, 20 R. (H.L.) 81.

[6] *Smith* v. *Ballingal*, *supra*.

SUBSECTION (2).—*Possession.*

(i) *Period.*

1290. The rules as to period of possession are (1) twenty years,[1] except (2) when the pertinent is a servitude, and then it is forty years,[1] *plus* extensions for periods of minority or legal disability of the parties against whom prescription is pleaded;[1] but negative servitudes are "incapable of possession and so of prescription,"[2] and (3) in adjudication titles, these not being "*ex facie* irredeemable,"[1] the period of possession required is as in the case of servitudes.

1291. Repeated efforts have been made to set up a doctrine of explicative possession with reference to claims based on the law of part and pertinent, with the object of holding a shorter period to be sufficient than is required by the statute 1617 c. 12 as amended by subsequent Acts. But those suggestions have been definitely decided not to express the law in questions of competition of land rights.[3] Yet even on this matter there is evidence of the refinements which affect the whole subject. Thus, apart altogether from the many specialties arising from the law of part and pertinent, Lord Watson has an important dictum on the necessary quality of prescriptive possession according to the relation between the parties to the dispute,[4] the point being that much less may serve for the purpose of construing or explaining, in a question with the author, the limits of an antecedent grant, than is required to establish a new and adverse right in the possessor. This is the doctrine of *contemporanea expositio*, and it appears necessary to keep it in view in cases of part and pertinent when, for example, the question arises between disponer and disponee; it can hardly arise between seller and purchaser before any title has been granted. Lord Watson's point is that, for this purpose, possession of part may establish right to the whole. But the rule of *comtemporanea expositio* may operate also in the direction of the duration of possession required between granter and grantee. This certainly holds in the sphere of commercial pertinents where the Act 1617 c. 12 has no application.

(ii) *Quality of Possession.*

1292. The periods above mentioned, as in all cases of prescription, relate to the duration of the possession. But it must be possession "following on such recorded title," and so it is customary and correct to speak of the length of title required. In cases not concerned with "parts and pertinents" the rule is absolute that, assuming the necessary title produced and possession on it, all further inquiry backward is shut out; prior to the deed which is the root of title nothing regarding the lands can be judicially known.[1] That rule does not hold when the title pleaded rests on part and pertinent; in that case it is competent to examine the writs far beyond the longest prescriptive period in order to prove or disprove the nature of the possession alleged, as having been of the quality required in part and pertinent cases or no.

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[1] Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 16.

[2] Bell's Prin., s. 994.

[3] Rankine, Land-Ownership, p. 201; *Baird* v. *Fortune*, 1861, 4 Macq. 127.

[4] *Lord Advocate* v. *Wemyss*, 1899, 2 F. (H.L.) 1, at p. 9.

1293. It is not enough to shew that the *de quo* has been possessed along with the principal property; it must have been possessed as part or pertinent of the latter.[2] Though this is here, and usually, stated as a requirement of the possession, it appears that it would be more correct to put it as a requirement in relation to the title to which the possession is ascribed. In *Hunt*[2] the ground in dispute had been thrown into the policy grounds of the house belonging to the possessor, and it had been possessed by him for forty years as part of the policy grounds of his house. That seems to be as strong a case as one can expect to find of an accessory character being attached to the prescriptive possession; it would not have been stronger if part of the ground had been used as a site for a stable or home-farm buildings. Where the case failed was on the examination of the titles. Neither was there any "bounding" quality in the title which barred the claim; nor had the claimant any other title to which his possession might be ascribed. The decision against him, in favour of the Crown, proceeded on the ground that he had possessed the alleged pertinent without any title at all, and that his possession was therefore fruitless. The titles were investigated far beyond the prescriptive period, and inferences were drawn from old writs.

1294. In connection with the distinction between what is part and what is pertinent, it is to be remembered that, apart altogether from any benefit from the law of part and pertinent, the rule is undoubted that the strictest feudal conveyancing does not require that every farm, or holding, or other part of the property shall be specified in the title. Neither is it required that the title shall be unambiguous. If the title is capable of bearing the construction sought to be put on it, though it might also bear a narrower interpretation, if there has been the more extended possession, that title is made out, without importing the principle of part and pertinent. "The terms of the grant may be ambiguous, or indefinite, or general, so that it may remain doubtful whether the particular subject is or is not conveyed, or, if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with, and capable of, a construction which would embrace such a conveyance that is enough,"[3] *plus* the necessary possession. "I hold it to be now settled law that a charter and sasine containing a description which can be so construed as to embrace an entire subject, though it may also be so construed as to embrace part of it only," if followed by the necessary possession, will "exclude all enquiry." [1]

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[1] Bell's Prin., s. 2010; *Fraser* v. *Lord Lovat*, 1898, 25 R. 603; *Simpson* v. *Marshall*, 1900, 2 F. 447; *Troup* v. *Aberdeen Heritable Securities Co.*, 1916 S.C. 918.

[2] *Lord Advocate* v. *Hunt*, 1867, 5 M. (H.L.) 1; *Duke of Argyll* v. *Campbell*, 1912 S.C. 458.

[3] Lord Justice-Clerk Moncreiff in *Auld* v. *Hay*, 1880, 7 R. 663.

1295. The undoubted and useful doctrine laid down in the above quotations raises a confusing conflict between such cases as *Auld* v. *Hay* [2] on the one hand, and the Dunfermline Palace case (*Lord Advocate* v. *Hunt*) [3] on the other hand. The former class of case demonstrates that the title may be in such terms that, apart from the clarifying factor of possession, it would be impossible to say whether it included areas X. and Y. or only area X. The title may even be such that the more probable reading would be that it was limited to X., but if the inclusion of Y. is not absolutely inconsistent with the terms of the title, and if in fact Y. has been possessed, the title is established to both X. and Y. And the proof of possession is strictly limited to the prescriptive period—now normally twenty years. No doubt it may happen that the writ which forms the root of title is considerably older than the period of necessary possession; but that is an accident, and however that may be, the examination is strictly limited to that root of title and the intervening writs, if any, up to date, and nothing earlier can be looked at or can be judicially known. That is the position in such cases as *Auld* v. *Hay*. The uncertainty of the title is resolved by possession within the time limit of prescription.

1296. Quite a different state of law is seen in the other class of cases where it is necessary to appeal to the doctrine of part and pertinent. The difficulty is that the two classes of cases bear a strong resemblance, and it is not clear that the distinction between them, apart from their different consequences, has been fully explored. The different consequences are in the following respects: (1) the quality of possession which is required; it must have been as part of or pertinent of the main property; at least this is how it is usually expressed, though the introduction of the word "part" seems enough to indicate a lack of clear differentiation from the other class of cases such as *Auld* v. *Hay*, and (2) the length of title which may be investigated; it is unlimited in point of time, and the claim may be defeated on facts gathered from very ancient writs.

1297. The matter cannot be further developed here than by the following quotation from Lord Johnston's judgment in *Duke of Argyll* v. *Campbell*: [4] "I do not feel perfectly confident in the correctness of the following distinction between a title which is capable of being construed as including a subject, and one which cannot be so construed, but of which the subject may be a pertinent. In the former case I think, if the description in the title is capable of being construed as including the subject, the title precludes enquiry into more ancient writs; if the possession is consistent with the title so construed, that is sufficient.

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[1] Lord Pres. Inglis in *Auld* v. *Hay*, 1880, 7 R. 663.

[2] Lord Justice-Clerk Moncreiff in *Auld* v. *Hay*, *supra*.

[3] 1867, 5 M. (H.L.) 1.

[4] 1912 S.C. 458.

But in the latter case the question must in my opinion always arise—is the alleged possession attributable to the title adduced or to something else? [or to nothing? [1]] For possession of the so-called pertinent may be on a totally different title, and in that case there is no ground for restricting proof to the prescriptive period, or for refusing to look at more ancient writs which may throw light on the possession of the alleged pertinent, for they would not go to affect the title, which must be accepted as habile to sustain prescription; they would go to the very different question whether the possession, which might quite well have been under the title, has not been really under something else."

1298. In cases of ambiguous possession the inclination is (*a*) in favour of the competitor who is infeft *per expressum* as against one who claims as part or pertinent, and (*b*) in favour of the competitor who claims in right of contiguous lands [2] as against one who does not.[3]

SUBSECTION (3).—*Particular Pertinents.*

1299. The cases noted below may be consulted as to claims to particular pertinents, etc.:

Access; [4] servitudes on the alienation of part by the common owner; [5] light, from street; [6] foreshore, whether the title be a barony or not, a Crown grant, not bounding, but not going expressly beyond high-water mark, carries no presumption that the foreshore is a pertinent; but long possession may be held to shew property; [7] liferenter's fixtures or fittings (wire fencing); [8] loch, exclusive,[9] or not; [10] seaweed, etc.; [11] wrack, whether meaning wreck or seaware; [12] peats; [13] vegetables in kitchen garden, held to be heritable; [14] fixed hearths, grates, gas lustres and brackets, picture rods, mirror used as sliding shutter, stone lions, fireclay vases, held to be moveable; [15] shop sign; [16] cornice, signboard; [17]

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[1] *Lord Advocate* v. *Hunt*, 1867, 5 M. (H.L.) 1.

[2] Ersk. ii. 6, 3.

[3] *Forsyth* v. *Durie*, 1632, Mor. 9629; *Glendonwyne* v. *Gordon*, 1716, Mor. 9643; *Lord Advocate* v. *Hunt*, *supra*.

[4] *Gow's Trs.* v. *Mealls*, 1875, 2 R. 729; *Walton Bros.* v. *Mags. of Glasgow*, 1876, 3 R. 1130; *Boyd* v. *Hamilton*, 1907 S.C. 912.

[5] *Ferguson* v. *Campbell*, 1913, 1 S.L.T. 241; *Carstairs* v. *Spence*, 1924 S.C. 380; Bell's Prin., s. 1010; *Thomson's Trs.* v. *Findlay*, 1898, 25 R. 407; *Kinloch* v. *Young*, 1911 S.C. (H.L.) 1; *Moyes* v. *M'Diarmid*, 1900, 2 F. 918; *Allan* v. *MacLachlan*, 1900, 2 F. 699.

[6] *Donald & Sons* v. *Esslemont & Mackintosh*, 1923 S.C. 122.

[7] *Agnew* v. *Lord Advocate*, 1873, 11 M. 309.

[8] *Graham* v. *Lamont*, 1875, 2 R. 448.

[9] *Scott* v. *Lord Napier*, 1869, 7 M. (H.L.) 35; *Meacher* v. *Blair Oliphant*, 1913 S.C. 417 (both *solum* and surface rights).

[10] *Stewart's Trs.* v. *Robertson*, 1874, 1 R. 334; *Meacher*, *supra*.

[11] *Baird* v. *Fortune*, 1861, 23 D. (H.L.) 5.

[12] *Lord Advocate* v. *Hebden*, 1868, 6 M. 489.

[13] *Grierson* v. *School Board of Sandsting*, 1882, 9 R. 437.

[14] *Nisbet* v. *Mitchell Innes*, 1880, 7 R. 575.

[15] *Ibid.*

[16] *Alexander* v. *Butchart*, 1875, 3 R. 156.

[17] *M'Arly* v. *French's Trs.*, 1883, 10 R. 574.

picture, part of decoration of room;[1] sundial;[2] threshing mill fixed in farm buildings;[3] dung dedicated in intention to the soil though not yet applied;[4] cisterns affixed (kept in position) by their own weight in large industrial works;[5] printing presses in a pottery, in connection with steam heaters, but not themselves fixed;[5] spinning machines in a mill, easily separable, and not specially adapted to the premises.[6]

Machinery, generally,[7] is heritable (1) when attached to the heritage, so that its removal means injury to one or other; or (2) though less completely attached if (*a*) it is essential or material to the use of the heritage; or (*b*) it has special value where it is from special adaptation; or (*c*) the intention of the party fixing it is expressed.

As regards title-deeds it is not clear that a purchaser is entitled to all the deeds in the seller's possession though relating only to the property sold.[8] Very full lists of articles are given by Mr Bell.[9]

SECTION 4.—INTESTATE SUCCESSION.

SUBSECTION (1).—*Intention.*

1300. Even in intestate succession the law regards the intestate's intention as a material factor on the question of what shall pass with the heritage as part or pertinent, or in other words as accessory. "The principle on which the cases of heir and executor proceed is intention or destination. Was it the purpose of the person who put them up to destine them to his heir? Did he so far as possible attach them to the ground having that end or effect in view? The presumption is that it was never meant that the executor should be allowed to dismantle the ground completely by taking away what was there for a special purpose in connection with the use to which the ground was put."[10] "The principle of law on which such questions depend is the general maxim that an accessory follows the principal. But what constitutes accession, or in what cases it is to be presumed, are sometimes questions of great difficulty. In the older authorities there is a strong leaning to the heir, but the emergencies of trade and altered social relations have modified this much."[11]

1301. Illustrative instances are (on the assets side) loose materials collected on the ground for building, which pass to the heir as adjuncts of the heritage;[1] and (on the liabilities side) an invalid heritable security, and the excess of debt over the value of the property included in a valid heritable security, both of which liabilities fall on the heir as adjuncts of the heritage.[2]

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[1] *Cochrane* v. *Stevenson*, 1891, 18 R. 1208.

[2] *Nisbet* v. *King*, 1624 Mor. 9628. "The dial was on a fixed standard but only set on a prick of iron fixed in the head of the standard and could be lifted of." It was held to pass under express pertinents in a contract of sale.

[3] *Reid's Exrs.* v. *Reid*, 1890, 17 R. 519.

[4] *Reid*, *supra*; *Dowall* v. *Miln*, 1874, 1 R. 1180, per Lord Neaves.

[5] *Bell's Tr.* v. *Bell*, 1884, 12 R. 85.

[6] *Dowall* v. *Miln*, *supra*.

[7] *Dowall* v. *Miln*, *supra*; *Brand's Trs.* v. *Brand's Trs.*, 1876, 3 R. (H.L.) 16.

[8] *Porteous* v. *Henderson*, 1898, 25 R. 1912, but consider *Duke of Argyll* v. *Campbell*, 1912 S.C. 458.

[9] Bell, Com. i. 789.

[10] Lord Shand in *Marshall* v. *Tannoch Chemical Co.*, 1886, 13 R. 1042.

[11] Lord Justice-Clerk Moncreiff in *Dowall* v. *Miln*, *supra*.

Subsection (2).—*Accessory Purchases.*

(i) *Analogy of Heritage and Conquest.*

1302. There is old law, quoted by Lord M'Laren[3] with approval, to the effect that when the distinction was recognised between heritage and conquest, if a man purchased the teinds of his own lands, to which he had succeeded, it was presumed that he had made the purchase with the intention of letting the teinds descend to the same heir who took the lands,[4] and that was held to be the effect if the purchaser died intestate. This can hold only if there is nothing to the contrary in the disposition of the teinds. The assumption is that the teinds "become absorbed in the right to the lands," as was judicially observed in another case[5] regarding mines of gold and silver, of which a special charter had been obtained from the Crown by the owner of the land; the result was that it was held that those minerals fell under a subsequent deed of entail, though not expressly mentioned in it. In the case of *Selkirk* it was laid down that when the superior purchases the *dominium utile*, expressly in order to consolidate, the property descends to the heir in the superiority, and it was further stated *obiter* that the Court would have been of the same opinion though the intention had not been expressed.[6] But at the date of the decision in *Selkirk* the notion of *ipso facto* consolidation had not been finally repudiated, and this was not so till nearly half a century later.[7] Decisions of the type here mentioned require at least to be kept in view in dealing with questions of intestate succession. If, for example, lands stood destined to the "children," and if the proprietor, while holding the lands under that destination, purchased the teinds and took the title thereof to himself barely, or to himself and "his heirs," it may well be that the teinds would be held to sink into the lands, for the benefit of the children. A similar question would arise, and it is thought with the same result, if at the proprietor's death his right to the teinds rested only on missives of purchase.

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[1] *Dowall* v. *Miln*, 1874, 1 R. 1180, per Lord Neaves; *Reid's Trs.* v. *Reid*, 1890, 17 R. 519, per Lord Pres. Inglis.

[2] *Bell's Tr.* v. *Bell*, 1884, 12 R. 85.

[3] Wills and Succession, p. 84.

[4] *Greenock* v. *Greenock*, 1736, Elchies, "Heritage and Conquest," 1; *Selkirk* v. *Hamilton*, 1740, Elchies, "Heritage and Conquest," 3. The different rule stated in Bell's Prin., s. 1672, applied to a purchase of teinds of lands not belonging to the purchaser. *Cf.* Ersk. iii. 8, 47.

[5] *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R. 826.

[6] Ersk. iii. 8. 47.

[7] *Bald* v. *Buchanan*, 1786, Mor. 15084; Ross's Leading Cases, ii. 210, 230; affirmed 3rd April 1787.

(ii) *Vassal Buying up Feu-duty.*

1303. The law having for a century and a half been clear that there is no *ipso facto* consolidation, it is difficult to extend the principle above stated to the case of the same person dying intestate, vested in two fees of superiority and property not consolidated. Yet a case of approximation is furnished if the owner of the *dominium utile* buys up the feu-duty, and the transaction is carried out by a deed of discharge of the feu-duty by the superior. That is supposed to be bad conveyancing, and it has even been suggested that it is feudally ineffectual. But undoubtedly it would be fully effectual in the separate sphere of succession, and beyond all question the feu-duty would be absorbed in the lands for the benefit of the heir to the lands under the investiture. According to the terms of feu-charters the feu-duty is sometimes redeemable by the vassal, either wholly or partially, on terms stated in the charter; if partially, an exercise of the power by the vassal would naturally be by a deed of discharge by the superior; and where the power extends to the whole feu-duty it sometimes happens that the superior allows an exercise of the power to be carried out by a disposition by him to the vassal of the *dominium directum.* In such cases if, at the vassal's death, the exercise of a power of total redemption of feu-duty rested on an intimation by him to the superior of his election to exercise the power, the result, in the vassal's intestate succession, might be very different from what it would have been if he had lived till the transaction was carried out.

(iii) *Proprietor Buying up Ground Annual.*

1304. The case of the intestate owner of land or other heritage having bought up a ground annual which burdened the property resembles the case of a feu-duty as dealt with above, inasmuch as ground annuals, whether redeemable or irredeemable, are still heritable *quoad* succession.[1] It is not known that any such case has arisen in intestate succession. It could arise only if the buying up of the ground annual took the form of an assignation and not a discharge, and if the destinations in the two titles were different. Without a deed of discharge there is no extinction of the ground annual *confusione*; at least that is how the case law stands,[2] though the question has not arisen purely, and perhaps the last word has not been said. If an intestate held both the property and the ground annual, and if, on the analogy of the old cases of heritage and conquest, there were held to be a unification for the benefit of the successor, it is clear that it must be the destination in the property title, and not the destination in the ground annual title, which would prevail, in which respect the case would differ entirely from that of superiority and property.

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[1] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 30.

[2] *Healy and Young's Tr.* v. *Mair's Trs.*, 1914 S.C. 893.

(iv) *Extension of Feu and Similar Cases.*

1305. Erskine expresses the principle of accession as applicable to cases where one vested with a heritable subject, descendible to his heirs-at-law, acquires right by purchase to another subject "intimately connected with the former." [1] But the only illustration which he gives is that of the acquisition of another estate or interest in the same land. It may be, therefore, that his doctrine is intended to be limited to cases where the second subject has the characteristic of intimate connection with the first subject even before the purchase of the former by the owner of the latter. Subject to that doubt, Erskine's doctrines would cover the case of a man, vested in a house with a destination to his children, subsequently buying ground for, and dedicating it to, an additional, or still more to a substituted, approach to the house, the title of this purchase being taken to him and his heirs. The case for application of Erskine's doctrine would be all the stronger if the new title contained provisions that the ground should be used only for the purpose of an approach to the house.

(v) *Leasehold Rights.*

1306. Leasehold titles present another case, and one essentially different from both superiority and property, and property and ground annual. Leaseholds resemble ground annuals inasmuch as they are heritable *quoad* succession; but no man can be his own tenant, and when the *dominium utile* and the leasehold meet in the same ownership, the latter is automatically absorbed in the former.

SUBSECTION (3).—*Uncompleted Building Contracts.*

1307. When a proprietor of a house dies intestate, after having obtained and approved of plans for buildings or alterations, and entered into contracts though only to a partial extent, and operations have commenced in his lifetime, the heir is entitled to compel the personal estate to provide the money for the whole of the work according to the plans.[2] This decision was given in a legitim case.

SECTION 5.—TESTATE SUCCESSION.

SUBSECTION (1).—*Testator's Intention.*

1308. In this division of the subject the controlling element is the testator's intention in the conventional sense of that expression. There may, therefore, be differences according as the will is prepared by a lawyer or is home made, and in the latter case according to the personal factor. The questions which arise are not limited to heritable property, and technicalities of title have little or no relevancy.

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[1] iii. 8, 47.

[2] *Malloch* v. *M'Lean*, 1867, 5 M. 335; see para. 1312, *infra*.

Subsection (2).—*Extent of Bequest.*

1309. *Houldsworth* v. *Gordon Cumming*[1] was a case of sale, but the dicta in it may support the view that, in cases of testate succession, the name used in the will to describe the heritage bequeathed, and how that name stands to the description in the testator's title, may not be conclusive or even very material. In *Houldsworth* the decision was that the sale carried less than the lands held by the seller under the same name in his titles; but in a succession case it might be that the bequest of "my estate of X." would carry, not only the lands to which the testator had succeeded or which he had purchased under that name, but also various subsequent additions.

Subsection (3).—*Ground Annual Liabilities.*

1310. A testator owned a house burdened with an irredeemable ground annual. She bought up the ground annual and took an assignation of it to herself. In her will she left the house to A., expressly subject to any ground annual affecting it. The legatee claimed the house free from the ground annual. The claim failed, and it was held that the legatee took subject to the ground annual, on the ground partly that it was irredeemable; partly that there was no extinction *confusione*; and partly of the reference in the will to ground annual.[2]

Subsection (4).—*Shifting Pertinent.*

1311. A testator had owned two properties A. and B.; he sold part of B. but subsequently reacquired part (C.) of that part, and it was averred that the part so reacquired had a special value to the owner of A., and that that had been the reason of the reacquisition. The testator bequeathed A. and B. to different legatees. The legatee of A. claimed C. as part and pertinent of A. The claim failed, and C. went to the legatee of B. on the grounds that it was originally part of B., and that the testator had not evinced an intention to transmute it into part and pertinent of A.[3]

Subsection (5).—*Accessory Purchases and Contracts.*

1312. Assuming a home-made will containing a bequest to X. of "my house in Queen Place, Edinburgh," it is suggested that that may raise questions as to whether the bequest does, or does not, cover the following: (1) an additional area taken after the house was built, to create a garden or to increase the garden, or to protect the amenity, or both; and this whether the additional ground lies into the original feu or does not, whether it is taken in feu or on long or short lease, and whether any technicality of bounding title exists; (2) the garage, whether built on the original area or not, whether built with the house or later, and with the variations of circumstances stated under the first head; (3) contracts made by the testator in his lifetime for an addition to, or re-decoration of, the house, whether the testator had or had not paid the contract prices, involving the question whether, in the latter case, the legatee would be entitled to require the testator's estate to pay the contract prices. It has been held in England that a legatee of land is entitled to the benefit of a contract made by the testator in his lifetime, but unexecuted at his death, for the building of a house on that land; the general estate must pay the price and the house goes to the legatee of the land, and this although the circumstances are such that the contractor would not be entitled to a decree for specific performance; [1] (4) contracts made by the testator in his lifetime for the acquisition of additional ground or for the building of a garage on the original ground; (5) claims for injurious affection of the property during the testator's lifetime, or for malicious or negligent damage during his lifetime; [2] (6) claims under a fire insurance policy, effected by the testator, for damage by fire during his lifetime; (7) all policies of insurance current at the testator's death in respect of premiums paid by him during his life; the contrary view is that the policies belong to the executor, who may surrender them for cash; (8) an obligation, whether contained in the title or not, by a third party to relieve the testator and his successors from payment of feu-duty or ground annual, or stipend, for all time coming.[3]

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[1] 1910 S.C. (H.L.) 49.

[2] *Healy and Young's Tr.* v. *Mair's Trs.*, 1914 S.C. 893.

[3] *Pattison* v. *Macindoe*, 1883, 20 S.L.R. 615.

1313. The problems indicated in the immediately preceding paragraph have been assumed to arise under a home-made will, but the mention of them may perhaps be of assistance in the professional preparation of wills. Assuming answers favourable to the legatee of the house, there might in some of the instances be difficulties in working out his remedy, but these relate to technicalities of conveyancing. It is clear that a bequest of a villa under the words "my house No. 10 Queen Place, Edinburgh," would carry many things as parts or pertinents which would not be held as covered under a policy of fire insurance on the house with the like description. Examples are or, according to circumstances, may be a conservatory, offices, and enclosing walls.

SUBSECTION (6).—*Agricultural Cases.*

1314. A bequest of a farm lease, or of the property of a farm of which the testator is occupying owner, does not carry the farm stock; and questions may arise regarding grass and other growing crops and many other matters. The fact that the legatee does not own the stock may in tenancy cases result in the landlord successfully objecting to receive the legatee as tenant.[1] The whole situation is one which calls for very special consideration in preparing the will of a tenant farmer or of an occupying owner of land. In tenancy cases the situation may be affected by stock or produce being bound to the ground by the terms of the lease.

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[1] Theobald on Wills, p. 289; see para. 1307, *supra*.
[2] *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917, per Lord Pres. Inglis at p. 921.
[3] *Welwood's Trs.* v. *Mungall*, 1921 S.C. 911.

SUBSECTION (7).—*Legacies of Corporeal Moveables.*

1315. Illustrations may be found also from specific legacies of corporeal moveables. It will probably not be disputed that a bequest of a violin would carry the violin case and bows. A bequest of a motor car may raise questions of the same nature as some of those stated above in connection with the bequest of a house, and others also, *e.g.* whether it would carry (1) the benefit of the unexpired period of the licence, for which the testator had paid the duty; (2) the like as to insurance; (3) also as to garage rent paid in advance; (4) also as to a contract for cleaning or maintenance of the car paid in advance; (5) a travelling rug always kept in the car; (6) baggage trunks or a luncheon basket selected to fit the car.

SECTION 6.—ASSIGNATIONS OF BONDS.

SUBSECTION (1).—*Personal Bonds.*

1316. An assignation of a bond gives the assignee by implication the benefit of diligence done on it [2] and of any existing bond of corroboration.[3] But it is not to be assumed that an implied title of this kind will enable the assignee to proceed by summary diligence. On the contrary, if an assignee of a personal bond, which has been registered for execution, is to do summary diligence on the decree of registration contained in the extract, he must hold an express assignation, not only of the bond, but also of that decree.[4]

SUBSECTION (2).—*Securities.*

1317. An assignation of the security for a debt carries by implication the personal obligation also.[5] This is the converse of the modern rule regarding assignations of bonds and dispositions in security.[6]

SUBSECTION (3).—*Bonds and Dispositions in Security.*

1318. In the case of a bond and disposition in security it is now statutory [6] that an assignation of the bond carries all the following without any mention of them: (1) the heritable security created by the bond; (2) all rights competent to the assignor to the writs; (3) "the full benefit of all corroborative or substitutional obligations for the debt, or any part thereof, whether contained in bonds of corroboration or clauses of corroboration, or agreements *in gremio* of conveyances, or by operation of law or otherwise"; (4) "right to recover payment from the debtor of all expenses properly incurred by the creditor in connection with such security," *i.e.* expenses incurred by the assignor or prior holders so far as not repaid; and (5) "the benefit of any notices which have been served calling up the security and all procedure which may have followed thereon." These enactments go very far, *e.g.* where the original bond and disposition in security was granted by A., but his obligation has been discharged and a "substitutional" obligation has been given by B., an assignation of what is therein described as a bond and disposition in security granted by A. is the prescribed form for passing the debt and security without any mention of A.'s discharge or of B.'s obligation. A waiver of lien and a decree of maills and duties will pass by implication by force of the implied reference to writs. But wide as the enactments are, they do not suffice to pass (1) any security over moveable assets created in the bond, *e.g.* a life policy; or (2) any additional or substituted heritable security beyond that created in the bond, whether created *simul ac semel* with the bond or subsequently.

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[1] Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), s. 28.

[2] Stair, iii. 1, 17; *Blair* v. *Gray*, 1610, Mor. 6301; *Hay* v. *Kerr*, 1622, Mor. 6302; *Smith* v. *Henderson*, 1629, Mor. 6303; *Williamson* v. *Threapland*, 1682, Mor. 6306.

[3] Stair, *supra*.

[4] Debtors Act, 1838, s. 7.

[5] *Dunbar* v. *Williamson*, 1627, Mor. 6302.

[6] Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 28.

SECTION 7.—COMMERCIAL PERTINENTS.

1319. It may be useful to give at least an enumeration of the most important of those things and rights which may be generally described as commercial pertinents, though that expression is not in common use. This may act as a reminder and suggest consideration.

SUBSECTION (1).—*Business Books.*

1320. On the sale of a retail business the purchaser is entitled to delivery of the books.[1] Further authority on sale transactions and authority applicable to partnership dissolutions is scanty.[2] The question of confidentiality may require consideration.[3] As to copyright in, *e.g.*, trade lists, booklets,[4] etc., and as to labels,[5] see the cases cited below.

SUBSECTION (2).—*Goodwill.*

1321. Goodwill does not pass by implication. Even if it is expressly assigned, the vendor may compete unless restrained. Goodwill may be wholly heritable, or it may be partly heritable and partly moveable, possibly it may be wholly moveable; also it may have no value. It may be wholly heritable though the deceased was tenant only with less than a year of the tenancy to run at his death, and only six months at the date of the sale.[1] In the case of a public-house in a large town the goodwill is generally wholly heritable.[2]

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[1] *Morrison* v. *Morrison*, 1900, 2 F. 382.

[2] *Truman* v. *Martindale*, 1832, 1 D. & Ch. 464; *Liqrs. of City of Glasgow Bank* v. *Assets Co.*, 1883, 10 R. 676.

[3] *Robertson* v. *Robertson's Trs.*, 1925 S.C. 606.

[4] *Reavis* v. *Clan Line Steamers*, 1926, S.L.T. 68.

[5] *Melrose-Drover, Ltd.* v. *Heddle*, 1901, 4 F. 1120.

SUBSECTION (3).—*Name of Firm or of Premises, etc.*

1322. The name passes by implication with the business and goodwill. But, on the other hand, the vendor also may use it unless restrained or unless exclusively assigned. Even the purchaser may be interdicted if his use involves risk to the vendor, unless there has been an express assignment.[3] Because a man is entitled to trade in his own name, it does not follow that, not so trading himself, he can pass on his right to another. With regard to the name of trade premises, *e.g.* "Sun Foundry," [4] as between landlord and tenant it may be a question whether such a name is a pertinent of the landlord's property or of the tenant's business. As to signs and figures, *e.g.* "Golden Lion," see the cases cited.[5]

SUBSECTION (4).—*Leases.*

1323. As to leases, including water rights, assignees will usually be excluded by implication, and often expressly, so that an arrangement with the landlord will probably be found necessary.

SUBSECTION (5).—*Mutual Trade Contracts.*

1324. These will usually be for supply of goods and materials to, or by, the business. The difficulty is *delectus personæ.* The cases are numerous and various in circumstances and results.[6] When matters are entire, "successors and assignees" should be inserted in the original contract. When matters are not entire, consider as to keeping the assignor in legal existence and taking mandates. Negative covenants by the vendor usually do not affect the purchaser.[7]

SUBSECTION (6).—*Restrictive Covenants and Service Contracts.*

1325. There may be restrictive covenants undertaken by third parties in favour of the business. The possible questions are (1) validity of restriction; (2) construction, as affecting what is or is not an infringement; (3) assignability; and (4) whether they have been assigned. It is not to be assumed that Scots law is the same as English law. There may be a distinction between professions and trades. The latest important case in Scotland is *Rodger* v. *Herbertson.*[1] The covenant is bad if unreasonable, and in sale cases the test of what is reasonable is the nature and extent of the business sold and as carried on by the vendor;[2] therefore great care is required when a small business is bought by a large concern. In framing and transferring such covenants "successors and assignees" should be inserted. Service contracts impliedly exclude assignation.[3] This may cover agency contracts.

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[1] *Graham's Trs.* v. *Graham*, 1904, 6 F. 1015.

[2] *Graham, supra*; *Muirhead's Trs.* v. *Muirhead*, 1905, 7 F. 496.

[3] *Townsend* v. *Jarman*, [1900] 2 Ch. 698.

[4] *Cowan* v. *Millar*, 1895, 22 R. 833.

[5] *Townsend, supra*; *Crawford's Trs.* v. *Lennox*, 1896, 23 R. 747.

[6] *Cole* v. *Handasyde*, 1910 S.C. 68; *Tolhurst* v. *Cement Manufacturers*, [1903] A.C. 414.

[7] *Melrose, Ltd.* v. *Aitken, Melrose, Ltd.*, 1918, 1 S.L.T. 109.

SUBSECTION (7).—*Trade Marks.*

1326. These may include (1) unregistered trade marks; (2) registered trade marks; and (3) mercantile marks and trade descriptions, as to which last see the Merchandise Marks Acts, 1887 to 1911. Trade marks can be assigned only with the goodwill. A British trade mark can pass only with the British goodwill, which means a trade, but not necessarily a place of business, in this country. An assignment of the goodwill carries trade marks by implication, but there may be specialties resulting in an implied reservation. Some trade marks are not assignable, or at least the assignee may not be entitled to use them.[4]

SUBSECTION (8).—*Income Tax.*

1327. (1) When there is a complete change of ownership there is no carry forward of any of the following: (*a*) the preceding year's trading result as basis of assessment; (*b*) losses; (*c*) wear and tear allowance, so far as not satisfied to the vendor. (2) When there is some partnership change, but not complete change of personnel, all those three, (*a*), (*b*), and (*c*), are carried forward, unless all parties concerned—both old and new—elect to be treated as if a complete change had taken place, in which case none of (*a*), (*b*), (*c*) is carried forward.

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[1] 1909 S.C. 256.

[2] *British Concrete Co.* v. *Schelff*, [1921] 2 Ch. 563.

[3] *Berlitz School of Languages* v. *Duchene*, 1903, 6 F. 181.

[4] *Pinto* v. *Badman*, 1891, 8 R.P.C. 181; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1865, 11 H.L. Cas. 523.

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